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, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, high technology and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent developments. 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.

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. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop a comprehensive plan before, 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 30 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

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 in 2018. 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 amended its law to ensure that it has the opportunity to review transactions in which the parties' turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on 'killer acquisitions' (i.e., acquisitions by a dominant company of a nascent competitor), particularly involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Some jurisdictions have adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions, and has developed guidelines for voluntary filings. 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 is similarly no 'local' effect 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., in 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 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, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before 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.

The United States and the European Commission (EC) both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies that are found to be in violation. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. 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 before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

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 Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. 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 addition, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

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 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. Even within the EC, there remain some jurisdictions 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 antitrust 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 US, 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 competition authority, 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 EC 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 is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following 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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Part II

Jurisdictions

Chapter 29

SWITZERLAND

Pascal G Favre and Marquard Christen[1]

I INTRODUCTION

Merger control in Switzerland is governed primarily by the Federal Act on Cartels and Other Restraints of Competition (CartA) and the Merger Control Ordinance (MCO; see Section III). 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 Berne that consists of up to 15 members. There are currently 12 members who were nominated by the federal government, the majority of whom 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 current staff of more than 70 employees (full-time and part-time), mostly made up of lawyers and economists), organised under four divisions: product markets, services, infrastructure and construction. A resources division is in charge of administrative and technical tasks within the Secretariat of the Competition Commission.

The types of transactions that are subject to merger control are mergers of two or more 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 exercises all the functions of an independent business entity on a lasting basis. If a joint venture 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 of the CartA, pre-merger notification and approval are required if two turnover thresholds are reached cumulatively in the last business year before the concentration as follows:

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

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

1 Pascal G Favre and Marquard Christen are partners at CMS von Erlach Poncet Ltd. The authors thank Fabian Martens, counsel at CMS von Erlach Poncet Ltd, for his contribution.

2 www.weko.admin.ch.

These thresholds are considered to be relatively high in comparison with international standards. 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 of 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) of the CartA, 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, as explained above, in the case of a dominant undertaking, the concentration must be notified to the Competition Commission before its implementation. If a concentration 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 CartA 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, however, has 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 such concentration for reasons of creditors' protection alone, 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; this is sometimes called the 'dominance-plus test'. Pursuant to Article 10 of the CartA, the Competition Commission may 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 were 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 (or is capable of eliminating) 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 some cases (notably the *Tamedia/PPSR (Edipresse)* case from 2009), 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 only very recently started playing a role (see the Gateway Basel North joint venture in Section II).

II YEAR IN REVIEW

The statistics in the Competition Commission's recently released Annual Report for 2019 showed generally higher M&A activity than in previous years.[3] The Commission received a total of 40 merger notifications in 2019 (compared with 34 in the previous year), of which 37 were cleared in Phase I. In three cases, the authority entered into an in-depth (Phase II) investigation, of which two were cleared in 2019 without conditions or requirements. The following concentrations were investigated in detail (Phase II).

The Swiss Federal Railways (SBB), Hupac and Rethman intended to create the Gateway Basel North, a national container terminal for import and export movements as well as the transalpine traffic of goods. The final stage of the project is a trimodal transshipment terminal connecting rail, river (the Rhine) and road. The Commission approved the transaction after an in-depth investigation (Phase II). The Commission found that the first large Swiss container terminal eliminated effective competition for the handling of containers, swap bodies and semitrailers in import and export traffic, primarily with regard to the turnover of goods transported by rail and ship-to-rail transshipment. However, the Gateway Basel North is also expected to produce substantial economies of scale in intermodal transport and increase competition in the import and export rail transport. The Commission held the view that these advantages would counter the negative impact of a dominant position in the goods handling sector.

In the telecommunication sector, the Commission examined a planned takeover of UPC (Liberty Global) by Sunrise. With the merger, Sunrise would have become the second-largest telecommunications company in Switzerland after incumbent Swisscom, by offering – as Swisscom – fixed network, broadband internet and mobile telephony services as

3 www.weko.admin.ch/dam/weko/en/dokumente/2020/jahresbericht_2019.pdf.download.pdf/Annual%20Report%202019.pdf.

well as digital television on its own infrastructure in Switzerland. The in-depth investigation focused on the likelihood of the creation of joint dominance of the new Sunrise and Swisscom. However, the Commission concluded that the acquisition would not lead to a collective dominance of Sunrise and Swisscom and that coordination between the companies was unlikely since UPC and Sunrise on one hand, and Swisscom on the other, were positioned differently. As a result, the merger was not considered to lead to the creation or consolidation of a dominant position in any of the markets analysed and was, therefore, approved by the Commission in September 2019. However, the deal was later cancelled due to a lack of Sunrise shareholder backing.

In December 2019, the Commission communicated that it would investigate the takeover of SBB Cargo by SBB and the logistics providers Planzer and Camion-Transport in detail. Planzer and Camion-Transport intended to participate with 35 per cent in SBB Cargo through their jointly held subsidiary Swiss Combi. Two other logistics providers each held 10 per cent in Swiss Combi. Planzer and Camion-Transport intended to bring their logistics expertise into SBB Cargo to optimise existing products and develop new products, and thereby increase SBB Cargo's economic efficiency and competitiveness. The Commission initially found indications of a dominant position in various relevant markets in the rail freight traffic, operator services and handling sectors. In April 2020, however, the Commission approved the merger. It concluded that the merger would create a dominant position for handling services in combined traffic in the region of Gossau/St Gallen in eastern Switzerland, but that the companies involved would not be able to eliminate effective competition.

Furthermore, in June 2019, the Swiss Federal Supreme Court rendered its decision on the right of Ticketcorner to appeal against the Commission's decision to block the planned merger between Ticketcorner and Starticket. Ticketcorner, the Swiss market leader in tickets sales, including events in entertainment, culture and sports, as well as ski ticketing in various ski areas, also operates numerous media platforms, including print magazines, digital channels, blogs and social media. Starticket, on the other hand, the second-biggest ticket marketer in Switzerland by volume of sales, was the ticket brokerage arm of the leading Swiss media group Tamedia (now TX Group). In May 2018, the Federal Administrative Court had rejected the appeal filed by Ticketcorner against the Commission's blocking decision due to the fact that Tamedia, Starticket's parent company, did not join that appeal. In June 2019, the Swiss Federal Supreme Court reversed this judgment of the Federal Administrative Court and instructed the Court to consider the appeal and reach a decision on the merits of the case. In the meantime, TX Group has sold Starticket to the UK-based See Ticket, a leading player in the global ticketing market.

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 and takes place in a related market, the filing of a merger notification is mandatory before the implementation of the concentration. Under Swiss law, there are no deadlines for filing. A transaction can be notified before the signing of the final agreements. However, the parties must demonstrate a good faith intention to enter into a binding agreement and 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. Such course of action can streamline the notification procedure. For example, the Secretariat can agree to waive some legal requirements in relation to the contents of the notification, or confirm completeness of the notification prior to the official filing of the notification. Furthermore, parties often contact the Secretariat for a preliminary assessment of the question as to whether or not a given transaction is subject to notification.

In the case of a merger, 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. However, if the assessment of a draft notification involves a large amount of work, the Secretariat may invoice this work as billable 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 is filed and the Competition Commission considers the filing complete, it will conduct a preliminary assessment (Phase I) and will have to decide within one month of the date of the filing whether there is a need to open an in-depth investigation (Phase II). If the Competition Commission decides to launch an in-depth investigation, it will have to complete it within four months. As regards the internal organisation, under its internal rules of procedure 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 conducted and whether the merger can be implemented ahead of the regular 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 investigation independent of that 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 dictate that as appropriate. Pursuant to the 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.

As a rule, the implementation of a concentration should not take place before the competition authorities' clearance. However, in specific cases, the authorities may allow an implementation to happen before clearance if it is for compelling reasons. This exception has been mainly used in cases of failing companies and, more recently, in the case of a pending public takeover bid (see Section IV). 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 is to 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 the following three conditions are fulfilled:

a the Competition Commission must be informed adequately about the concentration;

b specific reasons must be provided explaining why the notification cannot be submitted at that time; and

c if, after the Commission's review the concentration is not allowed, a potential cancellation of the transaction must be assessed.

In that particular case, those 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 Secretariat of the Competition Commission for review before the formal notification.

If the Competition Commission decides to launch a Phase II investigation, it has to publish its 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 of such remedies. 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 predetermined deadline. The Competition Commission, however, is not bound by third-party opinions or by the answers to the 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 given concentration.

A decision of the Competition Commission may be appealed within 30 days before the Federal Administrative Tribunal and, ultimately, before the Swiss Supreme Court. The duration of an appeal procedure varies, but may well exceed one year at each stage.

On 1 October 2019, 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 (the 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 CartA provides that the CartA 'applies to practices that have an effect in Switzerland'. Up until the time when the Merger Control Communication was issued, the Competition Commission and the Swiss courts held that each time the turnover thresholds set forth in Article 9 of the CartA were reached, the concentration would be considered to have an effect on the Swiss market. Thus, if a joint venture with no activity in Switzerland were created, in which the turnover thresholds were met by the parent companies, a notification would be required (see, for example, 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 (i.e., no activity or turnover in Switzerland; in particular, no deliveries into Switzerland) and does not plan to be active in Switzerland in the future, then the creation of this joint venture is not considered to 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 into Switzerland.

Another 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 (and later held in the Merger Control Communication) 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, in an informal consultation dated 2017, the Secretariat of the Competition Commission provided a clarification on a series of transactions, whereby the first transaction would lead to the sole acquisition of a target by one undertaking and a subsequent 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 the duty to notify, provided the individual transactions were dependent on each other and together formed a single operation.

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

The Merger Control Communication further 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.[4] The issue is the extent to which the other companies involved in the concentration may be categorised as potential competitors. Once again, the Competition Commission has aligned its practice in this regard with the practice in the EU. In general, a detailed description of such markets in the context of the merger control notification is only required if one of the following additional conditions is met: if another undertaking involved plans to enter the affected market or if that undertaking 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. The authority will also examine cases more closely in which another undertaking involved is already active in the same product market,

4 Article 11, Paragraph 1(d) MCO.

but not the same 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.

The clarification added in the Merger Control Communication on 1 October 2019 concerns takeovers by means of joint ventures (i.e., if a joint venture acquires control over the target). In this event, in general, only the joint venture is considered an undertaking acquiring control and, thus, an undertaking concerned. However, the Competition Commission will instead consider the parent companies as the undertakings concerned, rather than the joint venture, if one of the following conditions is met:

a the joint venture has been founded specifically for the purpose of acquiring the target, or, respectively, has not yet started to operate;

b an existing joint venture is not a full-function joint venture;

c the joint venture is an association of undertakings; or

d the parent companies are, in fact, the acting companies in the acquisition.

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 as an annex to the Swiss notification. This reduces the workload for the drafting of the Swiss notification, as the parties 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 still be drafted in one of the three Swiss official languages: French, German or Italian.

The Competition Commission usually strives to make a decision coherent with that of the European Commission in cases requiring parallel notifications in Brussels and Berne. On 17 May 2013, the Swiss government signed an agreement between the Swiss Confederation and the EU concerning cooperation on the application of their competition laws (Agreement). The Agreement entered into force on 1 December 2014. Under the Agreement, in merger procedures with parallel notifications in Switzerland and the EU (as may often be the case in cross-border M&A), the Secretariat of the Competition Commission no longer requires the prior consent of the parties to a transaction to initiate exchanges with the staff of the Directorate-General for Competition on technical and substantive issues to ensure coordination and streamlining in the parallel proceedings.

More generally, the Taskforce Cartel Act's report of January 2009 (see Section V) stated that in the context of growing globalisation, it would be appropriate for Switzerland to conclude cooperation agreements with its main trading partners to allow for the exchange of confidential information between competition authorities. In essence, the Agreement regulates the cooperation between the Swiss and European competition authorities. The Agreement is of a purely procedural nature and does not provide for any harmonisation of substantive competition laws. The two competition authorities shall notify each other in writing of enforcement activities that could affect important interests of the other contracting party. The Agreement contains a list of examples of cases in which notification must be given and provides for a time frame for notifications in relation to mergers and other cases (Article 3, Paragraphs 3 and 4). Furthermore, the Agreement sets forth the legal basis for the competition authorities to be able to coordinate their enforcement activities with regard to related matters.

The CartA does not contain any specific rules regarding public takeover bids. However, 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, in this regard also, substantially follows the rules of the EU Merger Control Regulation on public takeover bids. In addition, it is possible to request an early (provisional) implementation of a concentration prior to clearance, specifically in public takeover bids (see Section III).

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 CartA (see also Section IV). Article 59a of the CartA requires the federal government to evaluate the efficiency and conformity of any proposed measure in relation to the CartA before submitting a report and recommendation to the parliament regarding such measure. As regards concentrations, the Taskforce Cartel Act took the view at the time that, compared with other countries, the Swiss system, which only prohibits concentrations that can eliminate effective competition (under the current 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. The Taskforce recommended a harmonisation of the Swiss merger control system with the EU merger control system to eliminate such risk and to reduce the administrative workload with respect to transnational concentrations due to diverging tests, as well as the implementation of modern instruments to control the criteria governing intervention in the case of concentrations (the significant impediment to effective competition (SIEC) test, an efficiency defence and dynamic consumer welfare standard).

On 30 June 2010, the federal government published a set of draft amendments to the CartA for public consultation. The government proposed, inter alia, to replace the currently applied dominance-plus test with either a simple dominance test (whereby the additional criterion of a possible elimination of competition would be dropped) or a SIEC test by analogy with 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 both over Switzerland and at least the European Economic Area (EEA), and the concentration is appraised by the European Commission.

Based on the results of the consultation procedure, on 22 February 2012 the federal government released a dispatch to the parliament on the revision of the CartA 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 the 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). 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 for concentrations whereby all relevant geographic markets would comprise at least the EEA plus Switzerland and the concentration would be assessed by the European Commission. In such cases, the filing of a copy of Form CE with the Swiss authorities for information purposes would have been sufficient.

However, in September 2014, after a long parliamentary debate, the National Council finally rejected the proposed amendments and the CartA was not revised. According to the Competition Commission, a general rejection of the suggested amendments at the time without even considering the individual proposals was a missed opportunity to meet the need for reform highlighted in the evaluation. It also meant that several important changes proposed by the Council of States, including changes to the merger control regime, were no longer on the table.

Following rejection of the reform in 2014, individual parliamentary proposals have been submitted with the aim of revising specific points in the CartA.[5] At the same time, the Federal Council, based on its report on the issue of restrictions of parallel imports, dated 22 June 2016, instructed the Federal Department of Economic Affairs, Education and Research to prepare a consultation bill on modernising the merger control procedures in the CartA. The Federal Council takes the view that the current merger control regime does not sufficiently take into account the negative and positive effects of mergers, and that the current dominance-plus test should 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 (SECO), which had overall responsibility for drafting the bill, commissioned two reports on the implications of the introduction of the SIEC test on the Swiss merger control regime. The first report, which was released on 27 October 2017, analysed the consequences from an economic perspective that are likely to result from the introduction of the SIEC test in Switzerland. Among other conclusions, it recommends that such test be introduced. The second report, which was released on 12 February 2020, examined the extent to which mergers would have been assessed differently in Switzerland under the SIEC test. It concluded that the SIEC test is particularly suitable for intervening in mergers that are harmful to competition.

On 12 February 2020, the Federal Council tasked the Federal Department of Economic Affairs, Education and Research to prepare a consultation bill on a partial revision of the CartA with one of its main points being the modernisation of the merger control regime with the introduction of the SIEC test as recommended by the two reports commissioned by the SECO. The consultation is expected to start in the fourth quarter of 2020.

Another subject matter raised in the context of a revision of the Swiss merger control regime is the introduction of a control mechanism for direct foreign investments in Switzerland to allow for security and public order considerations when assessing such investments (postulate *Molina*). The Federal Council has rejected the postulate, arguing that the currently available means to monitor such direct investments are sufficient. The postulate has not yet been debated in the parliament.

5 See, for instance the de Buman Parliamentary Initiative of 30 September 2016, which demanded that four specific undisputed points addressed in the proposal rejected in 2014 be reintroduced, namely the amendments to the merger control regime, but which have been withdrawn in the meanwhile.

Appendix 1

ABOUT THE AUTHORS

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Dr Pascal Favre is the head of the competition practice group in Geneva. Dr Favre specialises in Swiss competition and distribution laws, in addition to corporate/M&A. He handles on behalf of corporate clients all competition and antitrust aspects of their business operations in Switzerland. He routinely advises national and multinational corporations in merger control proceedings and concentration notifications, including in parallel multi-jurisdictional filings. Dr Favre also represents companies in investigations by the competition authorities, as well as in administrative and court proceedings, including appeals before the Federal Supreme Court. In addition to assisting clients in investigations and searches, he provides advice on antitrust compliance and leniency programmes.

Pascal Favre achieved a doctor of laws degree, *summa cum laude* (Fribourg, 2005; awarded three prizes). He frequently writes on relevant topics and current issues affecting the competition climate in Switzerland, and contributes to renowned publications in the field of antitrust and competition laws. Dr Favre has co-authored 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'). He has also 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). In addition, Dr Favre has 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 Favre is a well-established antitrust and competition law practitioner recognised by both clients and ranking publications. He was identified in the area of competition in *The Legal 500 EMEA* 2019 editorial and in the 18th edition of *GCR 100*, in which his representation of SNCF Mobilités was highlighted.

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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. Marquard is a member of the five-headed steering committee of the global CMS Competition Group consisting of more than 190 competition lawyers. In addition to competition law, Marquard practises in the field of public procurement law and heads CMS Switzerland's public procurement group.

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. Owing 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.

Marquard graduated from the universities of Fribourg (*summa cum laude*) and Leuven, Belgium (EU law) and completed postgraduate studies in Sydney and Geneva (international law). He was admitted to the Bar in 2003.

Marquard regularly lectures and publishes on competition law. His publications include a contribution to a commentary on so-far unpublished legal opinions provided by the Secretariat of the Competition Commission to companies under Article 23(2) of the Federal Act on Cartels and Other Restraints of Competition. Most recently, he published an article on the impact of the covid-19 situation on the assessment of cooperation agreements among competitors.

A recognised expert in competition law by all major legal directories, Marquard is recommended in the current editions of *Chambers and Partners*, *The Legal 500* and *Who's Who Legal*. He is fluent in German, English and French, and also speaks Spanish and Dutch.

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