

Merger control in Switzerland: overview

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REGULATORY FRAMEWORK

1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction? What is the regulatory authority?

Regulatory framework

The following laws, regulations and guidelines apply:

- Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act).
- Ordinance on the Control of Concentrations of Undertakings 1996 (Merger Control Ordinance).
- Explanatory Note and Form of the Secretariat of the Competition Commission (Secretariat) on the Notification of a Proposed Concentration of 21 October 2014 (Status as of 28 August 2015).
- Note of the Secretariat on the Practice regarding the Notification and Assessment of Concentrations of 25 March 2009 (Status as of 1 October 2019).
- ICN Merger Notification and Procedures Template (February 2015).

The Competition Commission (COMCO) has not issued any guidelines on the substantive analysis of concentrations.

Regulatory authority

COMCO and the Secretariat have primary responsibility for enforcing the Cartel Act, including merger control proceedings. COMCO is the deciding body, while the Secretariat conducts the investigation and prepares the cases. COMCO may be involved in the proceeding in phase II (see *Question 4*). The Secretariat is divided into four departments responsible for proceedings concerning products, services, infrastructure and construction.

In addition to merger control, special notifications and authorisations are required if the concentration involves, among other things:

- Banks.
- Swiss real estate companies.
- Broadcasters of Swiss programme services.

TRIGGERING EVENTS/THRESHOLDS

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

The following transactions are deemed to be concentrations of undertakings subject to merger control:

- A statutory merger of two or more previously independent undertakings.

- An acquisition of control over one or more previously independent undertakings or parts of undertakings through any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement.
- An acquisition of joint control over an undertaking (joint venture).

The following joint ventures are caught by merger control if the joint venture performs all the functions of an autonomous economic entity on a lasting basis:

- Acquisition of joint control over an existing undertaking (also an existing joint venture).
- Founding of a new joint venture, if business activities from at least one of the controlling undertakings are transferred to the joint venture.

Control is assumed if an undertaking can exercise a decisive influence over the activities of the other undertaking through the acquisition of rights over shares or by any other means. The means of obtaining control can, in particular, involve the acquisition of the following:

- Ownership rights or rights to use all or parts of the assets of an undertaking (if those assets constitute the whole or a part of an undertaking that is a business with a market presence to which a market turnover can be attributed).
- Rights or agreements that confer a decisive influence on the composition, deliberations or decisions of the management organs of an undertaking.

Partial interests and minority shareholdings are only covered if they allow an undertaking to exercise a decisive influence over another undertaking (this can also be in combination with contractual agreements between the parties or other factual circumstances). There is a risk that the acquisition of a minority interest may qualify as an anti-competitive agreement if the undertakings concerned agree to co-operate.

Thresholds

Planned concentrations of undertakings must be notified to COMCO before their implementation, if in the financial year preceding the concentration both of the following apply:

- The undertakings concerned together reported a worldwide turnover of at least CHF2 billion, or a turnover in Switzerland of at least CHF500 million.
- At least two of the undertakings concerned each reported a turnover in Switzerland of at least CHF100 million.

For insurance companies, "turnover" is replaced by annual "gross insurance premium income" and in the case of banks and other financial intermediaries it is replaced by "gross income".

The Secretariat of COMCO (Secretariat) has decided in a case that a joint venture is exempted from notification (even if the parent companies meet the thresholds) if both:

- The joint venture does not have activities in Switzerland or does not generate any revenues in Switzerland.

- Activities or revenues are not planned in Switzerland and are not expected to take place in the future.

This practice has been published in the Note of the Secretariat on the Practice regarding the Notification and Assessment of Concentrations.

In addition, notification is mandatory under the Cartel Act if both:

- One of the undertakings concerned in proceedings was held to be dominant in a market in Switzerland in a final and non-appealable decision.
- The concentration concerns either that market or an adjacent market, or a market upstream or downstream of that market.

NOTIFICATION

3. What are the notification requirements for mergers?

Mandatory or voluntary

Notification is mandatory. See *Question 2*.

Timing

There is no applicable triggering event or time limit. However, notification must be made before the concentration is implemented.

For public bids for acquisitions of undertakings, the notification must be made immediately after the publication of the offer and before the acquisition is implemented. COMCO must be contacted in advance so that it can co-ordinate the proceeding with the Swiss Takeover Board.

The requirement to notify generally triggers when purchase agreements (or other relevant agreements) are concluded. If the purchase agreement is not yet concluded and the concentration is merely intended, a notification is possible if the notifying parties can credibly demonstrate that the undertakings taking part in the concentration are willing to conclude the purchase agreement.

In 2017, COMCO evaluated a merger that was going to take place in 2020. COMCO therefore assessed the issue three years in advance. However, the circumstances in the case were special, as the notifying parties were public hospitals owned by two cantons. The early notification was caused by the need to adjust cantonal law in order to proceed with the merger.

Pre-notification and formal/informal guidance

Undertakings often give a draft of the notification to the Secretariat in advance. The Secretariat then evaluates whether the notification is complete. It is also possible to contact the Secretariat informally before filing a notification where this is advisable.

Responsibility for notification

For statutory mergers, notification must be made jointly by the undertakings concerned. For acquisitions of control, the filing must be made by the undertaking or undertakings acquiring control. Where two or more undertakings must make the notification jointly, appeals by one party alone are possible (according to the Federal Supreme Court, which in 2019 overruled an opposite decision by the Federal Administrative Court).

Relevant authority

Notifications as well as pre-notifications must be submitted to the Secretariat, which also assesses the concentration. Decisions are subsequently taken by COMCO.

Form of notification

COMCO provides an explanatory note on its website (Explanatory Note and Form of the Secretariat on the Notification of a Proposed Concentration), which is available in:

- German
(www.weko.admin.ch/dam/weko/de/dokumente/2015/08/me_rkblatt_und_formularzusammenschlussvorhaben.pdf.download.pdf/merkblatt_und_formularzusammenschlussvorhaben.pdf).
- French
(www.weko.admin.ch/dam/weko/fr/dokumente/2015/08/note_explicativeetformulaireduneconcentration.pdf.download.pdf/note_explicativeetformulaireduneconcentration.pdf).
- Italian
(www.weko.admin.ch/dam/weko/it/dokumente/2015/08/circolare_e_modulodiconcentrazionidiimpresa.pdf.download.pdf/circolare_e_modulodiconcentrazionidiimpresa.pdf).

Filing fee

A flat fee of CHF5,000 must be paid by the undertakings concerned for the preliminary investigation (phase I) (see *Question 4*). If COMCO decides to conduct an in-depth investigation (phase II), the fees from that point onwards are time-based, with rates per hour ranging from CHF100 to CHF400.

The fee for the evaluation of the pre-notification is included in the flat fee of CHF5,000 if a notification is subsequently filed. If no notification is filed, the fee for pre-notification is charged as for expert reports and other services of the Secretariat. These fees are charged on a time-spent basis.

Obligation to suspend

The undertakings concerned must refrain from implementing the concentration for one month following the notification of the concentration, unless, at their request, COMCO has authorised them to do so for good reason, which is normally not the case. If no notice of the opening of an in-depth investigation is given within the one-month period (or if COMCO notifies the undertakings of the clearance of the transaction, whichever is earlier), the concentration can be completed.

If COMCO decides to initiate phase II, it must be completed within an additional four-month period, during which the implementation of the concentration is prohibited, unless authorised by COMCO in exceptional cases (see *Question 4*).

PROCEDURE AND TIMETABLE

4. What are the applicable procedures and timetable?

Parties must notify a concentration to the Secretariat if both of the following are established:

- There is a concentration within the meaning of the Cartel Act including the applicable legislation.
- The undertakings concerned meet the relevant turnover thresholds or other triggering events (see *Question 2*).

When a concentration is notified, COMCO conducts an investigation as follows:

- **Phase I.** A preliminary investigation begins on receipt of the complete notification. COMCO must decide within one month whether the concentration could create or strengthen a dominant position. The concentration can be completed if no notice of the opening of an investigation is given within one month (or if COMCO notifies the undertakings of the clearance of the transaction, whichever is earlier).
- **Phase II.** If there are indications that the concentration could create or strengthen a dominant position, COMCO opens an in-depth investigation. COMCO notifies the undertakings concerned of this decision. The Secretariat publishes the principal terms of the notification of the concentration and states the timeframe within which third parties can comment on the notified concentration. COMCO must make a final decision

within four months from the opening of the in-depth investigation. This time limit can only be extended if the proceeding has been delayed by the undertakings concerned. There is no "stop-the-clock" mechanism in Switzerland. However, there is a (unorthodox and rare) possibility of withdrawing and re-submitting the notification.

- The COMCO decision can be either:
 - clearance of the concentration;
 - clearance of the concentration subject to conditions or obligations (remedies);
 - prohibition of the concentration.

For an overview of the notification process, see flowchart, *Switzerland: merger notifications*.

PUBLICITY AND CONFIDENTIALITY

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The opening of an in-depth investigation (phase II) is legally required to be published. The Secretariat publishes the principal terms of the notification of the concentration. In addition, decisions or rulings are often published in COMCO's publication series (Law and Policy on Competition), as well as partly on COMCO's website (www.weko.admin.ch/weko/de/home/aktuell/letzte-entscheide.html).

Automatic confidentiality

COMCO and the Secretariat are bound by professional secrecy, and their publications cannot reveal any confidential information such as business secrets and personal data. The Secretariat published an explanatory note on 30 April 2008 (Explanatory Note: Business Secrets), which provides guidance on the handling of business secrets. The Secretariat eliminates confidential information before publication, usually by consulting the parties beforehand.

Confidentiality on request

The undertakings concerned can request that certain information is kept confidential. If the Secretariat disagrees, the undertakings concerned can request a formal order, which can be appealed to the Federal Administrative Court.

RIGHTS OF THIRD PARTIES

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations

In the preliminary investigation (phase I), third parties have no formal procedural rights and COMCO is not bound by any submissions or answers in response to questionnaires sent by the Secretariat (see *Question 4*). If an in-depth investigation is opened (phase II), the Secretariat publishes the principal terms of the concentration (see *Question 5*) and gives third parties (including customers, competitors, suppliers and so on) the right to state their position on the proposed concentration within a certain time limit. Third party hearings are usually held in the presence of the undertakings concerned.

Document access

In phase I, third parties as well as the undertakings concerned have no right to access the file. If an in-depth investigation is opened (phase II), the notifying parties have a right of access to the file concerning their concentration. Limitations can apply where confidential information, such as business secrets and personal data are concerned.

As a rule, third parties can request access to the files (including the parties' submissions) based on the Federal Act on Freedom of Information in the Administration (Freedom of Information Act). However, access to documents based on the Freedom of Information Act is granted only after an investigation has been closed by COMCO. In addition, limitations apply to confidential information, such as business secrets and personal data. To date, COMCO has only disclosed information to third parties in a relatively restrained manner, and there is little established practice on the relation between privacy and freedom of information in Switzerland.

Be heard

As third parties are not parties to the merger control proceedings, they have no right to be heard. However, see above, *Representations*.

SUBSTANTIVE TEST

7. What is the substantive test?

COMCO will prohibit a concentration, or authorise the concentration subject to conditions and obligations, if the investigation indicates that the concentration both:

- Creates or strengthens a dominant position liable to eliminate effective competition.
- Does not improve the conditions of competition in another market so that the harmful effects of the dominant position are outweighed.

In practice, the key issues in the substantive analysis are:

- The definition of the relevant markets.
- The effect of the concentration on the position of the undertakings concerned in the market.

The analysis of the effect of the concentration can include the following elements:

- Market shares.
- Degree of concentration.
- Actual competition.
- Potential competition, including barriers to entry and new market entries within two to three years.
- Possible countervailing power of the opposite market side.
- Financial strength.
- Access to supply and sales markets.
- Development of offer and demand.
- Substitutive competition.
- Collective dominance (if applicable).
- Improvement of the conditions for competition in another market.

COMCO usually clears transactions in phase I if there are no product and geographic markets that are affected by the concentration in which either:

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- Two or more of the undertakings concerned jointly hold a market share of 20% or more in Switzerland.
 - One of the undertakings concerned holds a market share of 30% or more in Switzerland.

8. What, if any, arguments can be used to counter competition issues (efficiencies, customer benefits)?

In particular, the following arguments can be used to counter any apparent reduction of competition caused by the concentration:

- There was no competition on the relevant market before the concentration. If so, the concentration cannot eliminate effective competition.
- The concentration results in efficiency gains that positively affect competition and that are passed on to the consumers.
- The concentration improves the conditions of competition in another market so that the harmful effects of the dominant position are outweighed.

9. Is it possible for the merging parties to raise a failing/exiting firm defence?

COMCO usually considers the following criteria:

- The allegedly failing/exiting undertaking would, in the near future, be forced out of the market if not taken over by another undertaking.
- The market share of the failing/exiting undertaking would be absorbed by the acquiring undertaking if the failing/exiting undertaking exits the market.
- There is no less anti-competitive alternative concentration than the notified concentration.

REMEDIES, PENALTIES AND APPEAL

10. What remedies (commitments or undertakings) can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

There are no specific provisions or procedures for offering and assessing remedies. If remedies become a potential issue or solution, close contact is established between COMCO, the Secretariat and the undertakings involved to define the scope of any potential remedies. The parties are normally asked at this stage which remedies are possible from their perspective. COMCO then assesses the remedies proposed by the parties, as it does not impose remedies that are not feasible from the parties' perspective. If no adequate remedies are found, COMCO generally prohibits the merger rather than impose remedies that are not accepted by the parties. The assessment of remedies has no impact on the timing of the investigation.

COMCO has in the past imposed structural remedies (such as divestments) as well as behavioural remedies. Structural remedies must be completed within a defined time period.

11. What are the penalties for failing to comply with the merger control rules?

Failure to notify correctly

Any undertaking that implements a notifiable concentration without filing a notification, or that fails to comply with a condition attached to an authorisation (remedial undertaking), is liable to a fine of up to CHF1 million. For repeated failure to comply with a condition attached to an authorisation, an undertaking is liable to a fine of up to 10% of the total turnover in Switzerland achieved by all the undertakings concerned.

Any natural person who implements a notifiable concentration without filing a notification, or who violates rulings relating to concentrations of undertakings, is liable to a fine of up to CHF20,000. Individuals have not been fined to date.

Any undertaking that does not fully fulfil its obligation to provide information or produce documents is liable to a fine of up to CHF100,000.

Implementation before approval or after prohibition

Any undertaking that implements a concentration before approval or after prohibition is liable to a fine of up to CHF1 million.

Any natural person who implements a concentration before approval or after prohibition is liable to a fine of up to CHF20,000. Individuals have not been fined to date.

Failure to observe

Any undertaking that fails to comply with a condition attached to the authorisation (remedial undertaking), implements a prohibited concentration or fails to implement a measure intended to restore effective competition is liable to a fine of up to CHF1 million. For repeated failure to comply with a condition attached to the authorisation, an undertaking is liable to a fine of up to 10% of the total turnover in Switzerland achieved by all the undertakings concerned.

Any natural person who violates rulings relating to concentrations of undertakings is liable to a fine of up to CHF20,000. Individuals have not been fined to date.

12. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

Rights of appeal

Decisions of COMCO and the Secretariat are subject to appeal by the parties.

Procedure

Appeals must be filed to the Federal Administrative Court within 30 days from the notification of the decision of COMCO or the Secretariat. The Federal Administrative Court applies essentially the same provisions as COMCO. Decisions of the Federal Administrative Court are subject to appeal to the Federal Supreme Court, again within 30 days from the notification of the decision.

There are no time limits for the Federal Administrative Court and the Federal Supreme Court to render their decisions on the appeal. The duration of the appeal proceedings are often more than a year for each court (and often significantly more). If two or more undertakings must make the notification jointly, appeals by one party alone are possible (according to the Federal Supreme Court, which overruled in 2019 an opposite decision by the Federal Administrative Court).

Third party rights of appeal

In merger control proceedings (as opposed to other proceedings before COMCO) third parties have no procedural rights (*Article 43(4), Cartel Act*) and no appeal rights.

AUTOMATIC CLEARANCE OF RESTRICTIVE PROVISIONS

13. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

COMCO does not automatically (not *ex officio*) review restrictive provisions in the agreements but only on request by the parties. COMCO normally only reviews ancillary restraints, in particular, non-compete obligations that are directly related and necessary to the concentration. Other agreements that are not covered by the clearance decision are subject to the same rules applicable to any agreement. These agreements can be submitted to the Secretariat for a formal or informal ruling (separate proceeding), which can be useful in certain circumstances.

REGULATION OF SPECIFIC INDUSTRIES

14. What industries (if any) are specifically regulated?

There are particular rules for the calculation of the thresholds for notification in relation to the following industries that replace the normal thresholds for notification:

- For insurance companies, "turnover" is replaced by annual "gross insurance premium income".
- For banks and other financial intermediaries, "turnover" is replaced by "gross income".

In addition, if a concentration of banks within the meaning of the Banking Act is deemed necessary by the Swiss Financial Market Supervisory Authority (FINMA) for reasons related to creditor protection, the interests of creditors may be given priority. In these cases, FINMA takes the place of COMCO and FINMA invites COMCO to submit an opinion.

15. Has the regulatory authority in your jurisdiction issued guidelines or policy on its approach in analysing mergers in a specific industry?

COMCO has not issued any guidelines on the substantive analysis of a concentration.

POWERS OF INTERVENTION AND FOREIGN INVESTMENT REVIEW

16. What powers does the national government have to intervene in mergers on the grounds of public interest, national security or media plurality?

There are no general restrictions on foreign investment in Switzerland on the basis of national interest or security, as have been enacted in several other jurisdictions. In February 2019, the Federal Council decided against foreign investment controls for the time being. However, the Federal Council intends to conduct a monitoring procedure and review the matter within the next four years. In addition, one Chamber of the Swiss Parliament approved a motion requesting that an investment control law be issued and enacted. It remains open whether the second Chamber of Swiss Parliament will approve this motion.

However, there are provisions that can impact on the acquisition of Swiss target enterprises in specific sectors. These provisions are not on the basis of national interest or security, but can nevertheless impose restrictions such as approvals, state licences and concessions (mostly on a federal level, but sometimes also on a cantonal level) in sectors such as:

- Banking, finance and insurance.
- Telecommunications.
- Transportation.
- Energy.
- Military arms and supplies.
- Lotteries and gambling.

For example, the acquisition by a foreign investor of a prudentially supervised bank or financial institution requires an approval from FINMA. Different tests apply to the acquisition of a controlling stake (such as when foreigners holding qualified participations directly or indirectly hold more than half the voting rights or exert a controlling influence in any other way) and the acquisition of a minority interest. The approval of an acquisition of a controlling stake depends on, among other things, the granting of reciprocal rights by the country in which the qualified participant is resident or domiciled.

In addition, the Federal Law on the acquisition of real estate in Switzerland by non-residents (known as *Lex Koller*), for example, restricts the direct or indirect acquisition of non-commercial real estate in Switzerland by foreigners. These rules can also apply to a target entity that has a commercial purpose and pursues commercial activities, if it owns residential real estate in its portfolio or has a significant unused land reserve.

17. Are there any post-closing or foreign investment review filing requirements?

Not applicable (*see Question 16*).

JOINT VENTURES

18. How are joint ventures analysed under competition law?

The Cartel Act and the respective regulations do not provide for any specific substantive rules on joint ventures (*see Question 1*). The same rules as outlined under *Question 7* apply. Joint ventures that are not covered by merger control are still subject to the rules applicable to agreements. For joint ventures covered by merger control, the co-ordinating effects between the parent companies as well as between each parent company and the joint venture are also subject to the rules applicable to agreements. However, an exception applies for co-ordinating effects, which are normally lawful if they result from the fact that every parent company has an interest in exercising its control so as to maximise the profit resulting from its participation in the joint venture as well as from its own activity.

INTER-AGENCY CO-OPERATION

19. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to merger investigations? If so, what is the legal basis for and extent of co-operation (in particular, in

relation to the exchange of information, remedies/settlements)?

A co-operation agreement on competition between Switzerland and the EU was enacted on 1 December 2014. In relation to merger control it covers, in particular:

- The exchange of information obtained by the competition authorities in the course of merger proceedings.
- Notifications of merger investigations.
- The co-ordination of merger enforcement activities.

In addition, the Secretariat often asks the undertakings concerned for waivers allowing the Secretariat to contact other competition authorities (for example, national authorities in and outside the EU).

RECENT MERGERS, CASES, TRENDS AND STATISTICS

20. What notable recent developments, trends or notable recent mergers or proposed mergers have been reviewed by the regulatory authority in your jurisdiction and why is it notable? Are there any statistics published on annual merger reviews conducted in the jurisdiction?

In 2017, COMCO prohibited a concentration between Ticketcorner Holding, Tamedia, Ticketcorner and Starticket that would have resulted in Starticket and Ticketcorner being under joint control. COMCO argued that there were distinct markets for external and internal distribution of tickets. It concluded that there would be no dominant position in the market for internal distribution of tickets but that there would be a dominant position liable to eliminate effective competition in the market of external distribution of tickets. COMCO also concluded that the concentration would have conglomerate effects between the media enterprises Tamedia and Ringier. The decision was appealed before the Federal Administrative Court. However, only Ticketcorner Holding and not Tamedia appealed the decision, and the Federal Administrative Court negated the right to appeal the decision by one party alone (see *Question 3*). The procedural decision of the Federal Administrative Court was appealed before the Federal Supreme

Court, which overruled the Federal Administrative Court and decided that appeals by one party alone are possible. The proceeding is now (again) pending before the Federal Administrative Court.

COMCO also reviewed several mergers in the media sector that led to in-depth investigations, including the:

- Acquisition of Goldbach, active in the market for TV and radio marketing, by Tamedia AG, active in the media sector and diversifying into the platform business. COMCO concluded that there was no potential creation or strengthening of a single or collective domination position that could eliminate effective competition and cleared the transaction.
- Joint venture of the two media companies, AZ Medien AG and Neue Zürcher Zeitung in the field of regional media publications. COMCO reviewed over 100 relevant markets, including regional and national newspaper and publicity markets, and TV and radio markets. COMCO concluded that the potential creation or strengthening of a single or collective domination position in different markets did not eliminate effective competition and cleared the transaction.
- Acquisition of Basler Zeitung AG by Tamedia AG. COMCO concluded that a potential collective domination position on the newspaper market in the Basel region could not eliminate effective competition and cleared the transaction.

ADDITIONAL INFORMATION AND PROPOSALS FOR REFORM

21. Are there any proposals for reform concerning merger control?

A proposed revision of the Cartel Act was rejected in Parliament in September 2014. The "significant impediment to efficient competition test" (SIEC test), which is commonly applied in the EU in relation to merger control, was to have been introduced. This amendment was uncontroversial and was widely accepted. It is still unclear which elements of the rejected package will be taken up separately in future revisions. The State Secretariat for Economic Affairs issued a white paper in 2018 to discuss possible amendments to the Cartel Act, including the implementation of the SIEC test.

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