MERGER CONTROL

Switzerland

LEXOLOGY
Getting The Deal Through

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Merger Control

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Quick reference guide enabling side-by-side comparison of local insights into legislation and regulators; scope of legislation; thresholds, triggers and approvals; notification and clearance timetable; substantive assessment; remedies and ancillary restraints; involvement of other parties or authorities; judicial review; enforcement record and reform proposals; and recent trends.

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Table of contents

UPDATE AND TRENDS

Key developments of the past year

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Switzerland

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

What is the relevant legislation and who enforces it?

Swiss merger control is mainly governed by the Federal Act on Cartels and Other Restrictions of Competition (CartA) as well as the Ordinance on the Control of Concentrations of Undertakings (together, the Competition Law). The Competition Law came into effect on 1 July 1996 and was revised in 2004. Further minor amendments have since been made.

Merger control is enforced by the Competition Commission (ComCo). ComCo has between 11 and 15 members (currently 12) elected by the Federal Council, the majority of whom must be independent experts. It is based in Berne.

The cases are prepared and processed by the Secretariat of ComCo. The Secretariat is divided into four departments responsible for product markets, infrastructure, services and construction, respectively.

Law stated - 17 May 2023

Scope of legislation

What kinds of mergers are caught?

Transactions that are subject to merger control are:

1. statutory mergers of previously independent undertakings;
2. acquisition of control over a previously independent undertaking or parts thereof, including through the acquisition of equity interests or the conclusion of agreements; and
3. acquisition of joint control over an undertaking (joint venture).

Regarding point (2), acquisitions of minority shareholdings are not subject to merger control, except for any contractual arrangements or factual circumstances conferring factual control on the minority shareholder; however, ComCo has decided that the acquisition of a minority interest may qualify as an anticompetitive agreement if the undertakings concerned intend to cooperate.

Law stated - 17 May 2023

What types of joint ventures are caught?

Three different types of joint ventures are caught by merger control:

- acquisition of joint control over an existing undertaking;
- acquisition of joint control over an existing joint venture if the joint venture performs all the functions of an autonomous economic entity on a lasting basis; and
- creation of a new joint venture if the joint venture performs all the functions of an autonomous economic entity on a lasting basis and if the business activities from at least one of the controlling undertakings are transferred to the joint venture.

Joint ventures for a transitional period are generally not caught by the Competition Law unless the period envisaged is

sufficiently long or the term is renewable.

Law stated - 17 May 2023

Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law defines 'control' as the ability to exercise a decisive influence on the activity of another undertaking by acquiring its shares or by any other manner. In particular, this ability is deemed to exist if an undertaking is in a position to determine the production, the prices, the investments, the supply, the sales or the distribution of the profits of the other undertaking.

Control is also assumed if major aspects of a company's business activity or its general business policy may be decisively influenced. Whether control is actually or potentially, directly or indirectly, de jure or de facto exercised is irrelevant.

The mere acquisition of a non-controlling minority interest or a representation in executive bodies is not notifiable. In contrast, a board or management representation could confer control if associated with veto rights concerning strategic decisions. Similarly, other rights or contractual arrangements could confer control if they decisively influence the composition, the deliberations or the decisions of the executive bodies, and need to be assessed on a case-by-case basis.

Law stated - 17 May 2023

Thresholds, triggers and approvals

What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The test applied to mergers is based on turnover. Two turnover thresholds must be reached cumulatively:

- for the business year prior to the merger, the undertakings concerned must have reported an aggregate turnover of at least 2 billion Swiss francs worldwide or an aggregate turnover in Switzerland of at least 500 million francs; and
- at least two of the undertakings involved in the transaction must have reported individual turnovers in Switzerland of at least 100 million francs.

These monetary amounts are relatively high compared to other jurisdictions. Turnover is calculated on a consolidated basis but excludes intra-group business.

In the case of insurance companies, the gross annual insurance premiums are taken into account for the purpose of determining the relevant thresholds.

The turnover calculation for banks and financial intermediaries is based on gross income. With respect to the geographical allocation of turnover, ComCo's notification form provides that the Swiss turnover of a bank or financial intermediary is calculated based on the income received by the branch or division established in Switzerland.

In general, the test for the geographical allocation of the turnover is the contractual delivery place of a product (place of performance) and the place where competition with other alternative suppliers takes place, respectively. The billing address is not relevant.

According to ComCo, to convert notification thresholds or turnover from a foreign currency into Swiss francs, the most

recent annual average exchange rate published by the Swiss National Bank should be used. If an undertaking's financial year does not correspond to the calendar year, the applicable exchange rate should be calculated based on the monthly average exchange rates as also published by the Swiss National Bank.

In addition, pursuant to article 9, paragraph 4 of the CartA, a proposed concentration triggers a merger notification obligation irrespective of any turnover thresholds if:

- one of the undertakings concerned has been held to be market dominant in Switzerland in a final and non-appealable decision; and
- the concentration concerns either that market or an adjacent, upstream or downstream market.

ComCo does not publish a list of undertakings that are held to be dominant, and it tends to interpret article 9, paragraph 4 of the CartA broadly. According to ComCo, the joint venture and the companies controlling the joint venture must be considered when determining whether a notification obligation is triggered.

Further, according to a recent decision by the Federal Administrative Court, a notification obligation is triggered if it cannot be ruled out from the outset that the dominant position might have effects on competition in any market affected by the proposed concentration. The transaction does not need to concern a market that is directly adjacent to the dominated market.

Law stated - 17 May 2023

Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory prior to completion of the transaction, provided that the turnover thresholds are reached or a market dominant position within the meaning of article 9, paragraph 4 of the CartA has been established in a final, non-appealable decision. Violations of the notification obligation may be sanctioned by ComCo.

As an exception to this principle, the competent competition authorities are of the opinion that the reporting obligation does not apply due to the lack of effects on the Swiss market if, on the one hand, a joint venture has neither activities nor sales in or to Switzerland and to territories adjacent to Switzerland and, on the other hand, such activities or sales in Switzerland are neither planned nor expected in the future. The exception is applied very narrowly.

Law stated - 17 May 2023

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Competition Law is applicable to foreign-to-foreign mergers, provided that the relevant turnover thresholds are reached with respect to Switzerland or a market dominant position pursuant to the meaning of article 9, paragraph 4 of the CartA has been established in a final, non-appealable decision. According to the Federal Supreme Court, whenever the Competition Law thresholds are met, an effect on the Swiss market is presumed, thus triggering a mandatory pre-merger filing.

In practice, given the relatively high thresholds, it is unlikely that a foreign-to-foreign merger would become subject to the Swiss merger control regime without, at the same time, being subject to relevant foreign merger control rules.

Law stated - 17 May 2023

Are there also rules on foreign investment, special sectors or other relevant approvals?

In March 2020, the Federal Council was commissioned by the Federal Assembly to prepare an act on investment control. The Federal Council published the contemplated cornerstones of a Swiss foreign investment screening regime. The new foreign investment act is expected to broaden the scope of mandatory government approval of foreign investments, which is currently limited to specific requirements in a few regulated industries and sectors.

Currently, there are no generally applicable Swiss acts (ie, catch-all rules in foreign trade legislation) that prohibit or require a specific screening of foreign investments in Switzerland on the basis of national interest, regardless of the industry sector; however, foreign investments in companies engaged in certain regulated industries and sectors in Switzerland might require government permission or approval. For example, special authorisations are required if the merger transaction involves banks or Swiss real estate companies.

In particular, if a bank incorporated under the laws of Switzerland becomes foreign-controlled, or if, in the case of a foreign-controlled bank, the foreign holders of a direct or indirect qualified participation in the Swiss bank change, a new special licence for foreign-controlled banks must be obtained prior to that event. The competent authority is the Swiss Financial Market Supervisory Authority (FINMA).

When a concentration of banks is deemed necessary for reasons related to creditor protection, namely rescue mergers, FINMA replaces ComCo, which is given a right of consultation only; however, the notification must still be addressed to ComCo if the jurisdictional thresholds for notification are met.

As a further example, any acquisition or actions that qualify as an acquisition of residential real estate assets in Switzerland are subject to the Federal Act on the Acquisition of Immovable Property in Switzerland by Foreign Non-Residents if the acquiring person qualifies as a 'person abroad' under this Federal Act. Accordingly, the parties of a merger involving a foreign undertaking and a Swiss real estate company (ie, a company whose principal purpose is the holding of real estate in Switzerland and whose assets include a significant portfolio of residential properties in Switzerland) may need to obtain a special permit from the competent cantonal (local) authorities.

Furthermore, special authorisation requirements apply to undertakings holding special rights, such as broadcasting, telecommunication, nuclear energy and air transport licences.

Law stated - 17 May 2023

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A filing must be made prior to the completion of the merger. Typically, therefore, a filing will be made after the relevant agreements have been signed, but prior to completion.

If a notifiable merger is not filed, the undertaking that was required to file may face a fine of up to 1 million Swiss francs. In addition, the management (individuals) may also be personally fined up to 20,000 francs. ComCo has considerable discretion in determining the specific sanction to be imposed but takes into account the circumstances of the individual case, and the general principles of proportionality and equal treatment.

To date, ComCo has imposed several fines on undertakings that did not file or filed a notification too late. In contrast, to date, no managers of such undertakings have been fined. The amount of the sanction depends on the particular circumstances of the case, in particular the size of the company, the nature and gravity of the violation, and any

aggravating or mitigating circumstances, or both. In assessing the aggravating and mitigating circumstances, the subjective elements (ie, whether the notification requirement was breached intentionally or negligently) are to be taken into account.

Law stated - 17 May 2023

Which parties are responsible for filing and are filing fees required?

In the case of a statutory merger, the notification must be made jointly by the companies involved. Where control over an undertaking is acquired, the filing must be made by the undertaking or the undertakings acquiring control.

If a joint notification is made, the undertakings must designate at least one common representative to ComCo.

For a Phase I investigation, there is a lump sum filing fee of 5,000 Swiss francs. In a Phase II investigation, the Secretariat of ComCo charges an hourly rate of 100 to 400 francs, depending on the urgency of the case and the seniority of the case handler.

Law stated - 17 May 2023

What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Once notification is complete, there is a first waiting period of a maximum of one month in which the undertakings are not allowed to complete the concentration (provisional ban). ComCo informs the undertakings concerned of the opening of an investigation within this one-month period. If no notice is given within that time frame, the concentration may be implemented without reservation.

The provisional ban does not apply if ComCo, prior to the expiry of the one-month period, notifies the undertakings that it considers the concentration to be in compliance with the Federal Act on Cartels and Other Restrictions of Competition (CartA) and the Ordinance on the Control of Concentrations of Undertakings (together, the Competition Law) (comfort letter).

If ComCo decides to open an investigation, the provisional ban is automatically extended until the end of the investigation. Alternatively, ComCo, at the request of the undertakings, at any stage of the procedure, may authorise the implementation of the merger for good cause, in particular if the merger otherwise could not be completed or the undertakings would suffer great financial loss.

Law stated - 17 May 2023

Pre-clearance closing

What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If an undertaking fails to comply with the provisional ban on closing the merger after notification to ComCo, the undertaking may face a fine of up to 1 million Swiss francs. In addition, the undertaking may be required to take measures to reinstate effective competition by unwinding the transaction, by ceasing to exercise effective control or by any other appropriate action, such as the termination of personnel ties or contractual guarantees to competitors or counterparties.

Unlike for breach of the notification requirement, there are no individual sanctions for the management.

Law stated - 17 May 2023

Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As merger control rules are applicable to foreign-to-foreign mergers, such mergers are also subject to the ordinary sanctions regime. ComCo has already fined undertakings in foreign-to-foreign mergers for breaching the notification requirement (Rhône-Poulenc SA/Merck and Banque Nationale de Paris (BNP)/Paribas).

Law stated - 17 May 2023

What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Competition Law does not provide for any specific solutions to remedy Swiss antitrust issues in a foreign-to foreign merger. Instead, the general remedies are applicable.

To our knowledge, hold-separate arrangements have never been put into practice or accepted by ComCo in relation to a foreign-to-foreign merger; however, arrangements regarding the voting rights of the shares of a party to the merger have been accepted and practiced. If the antitrust issue is merely a local one and therefore does not arise at a European level, it may often be remedied on the basis of arguments regarding competition submitted in the filing.

Law stated - 17 May 2023

Public takeovers

Are there any special merger control rules applicable to public takeover bids?

The Competition Law does not contain any specific rules regarding public takeover bids. In those cases, ComCo 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, ComCo will substantially follow the rules of the EU Merger Regulation on public takeover bids. It is also possible to request provisional completion specifically in public takeover bids.

Law stated - 17 May 2023

Documentation

What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

ComCo issues a standard notification form. The notification form basically requires undertakings to provide the following information and materials:

- the company name, the registered office and a description of the business activity of the parties to the merger;
- a description of the proposed merger, including the objectives to be achieved by it;
- turnovers, gross premium revenues or gross income, as the case may be, of the undertakings involved for Switzerland and worldwide;
- information on the relevant product and geographic markets affected, as well as information on the main competitors and respective market shares;

- data regarding new market entries over the past five years in the relevant markets as well as barriers to entry and, in particular, estimates of market entry costs;
- copies of the latest annual accounts and business reports of the undertakings involved; and
- copies of the relevant agreements relating to the merger.

For public tenders, copies of the public tender offer and copies of reports, assessments and business plans made in connection with the merger, to the extent that they contain information relevant for the assessment of the merger for competition purposes, must also be supplied.

Depending on the complexity of the case, the preparation of a typical filing may take anywhere between two and six weeks. A filing can be made in any one of the official languages of Switzerland (French, German or Italian). Accompanying documents may also be submitted in English.

For foreign-to-foreign mergers that do not significantly affect the Swiss market but meet the threshold requirements, a simplified notification procedure is available upon application. ComCo may, for valid reasons, release the applicant from the obligation to provide certain information and materials.

According to article 40 of the CartA, undertakings concerned in concentrations and affected third parties shall generally provide the competent competition authorities with all the information required for their investigations and produce the necessary documents. Failure to fulfil or incorrect fulfilment of the duty to provide information is subject to fines of up to 100,000 Swiss francs against the defaulting company pursuant to article 52 of the CartA, or by fines of up to 20,000 francs against the defaulting natural person pursuant to article 55 of the CartA.

In both cases, the competent competition authority must have, among other things, issued a binding decision on the duty to provide information that has not been fulfilled or has not been fulfilled correctly by the addressee of the decision.

Law stated - 17 May 2023

Investigation phases and timetable

What are the typical steps and different phases of the investigation?

In the first step of an investigation (which is normally the pre-notification phase during which the Secretariat of ComCo reviews a draft notification), the Secretariat usually requests further information from the parties. The undertakings involved in the merger must furnish ComCo with any additional information that it may request.

In the second step, unless the filing obviously raises no concerns, the Secretariat sends out questionnaires to competitors, suppliers and customers of the undertakings involved. The answers received will usually have an important bearing on the position taken by ComCo.

If ComCo decides to open a Phase II investigation, this is published. Usually, in a Phase II investigation, hearings take place and the parties may file further documents and information. ComCo also sends out additional questionnaires to customers, suppliers and competitors to deepen the market research and analysis. Finally, when it comes to remedies, close contact is established between the Secretariat and the undertakings involved to define the scope of any remedies.

Law stated - 17 May 2023

What is the statutory timetable for clearance? Can it be speeded up?

Within one month of receiving the complete notification, ComCo must notify the undertakings of whether it intends to

initiate an investigation (Phase I of the procedure). If, within this period, no notification is made by ComCo, the merger may be completed.

In practice, the one-month period can be shortened in less complex filings if, prior to the formal notification, the draft filing is submitted to ComCo for review, thus enabling ComCo to communicate its position shortly after formal notification is made.

If ComCo decides to initiate an investigation (Phase II of the procedure), it must be completed within four months, unless the process has been delayed by the undertakings concerned. There is no possibility for ComCo to prolong Phase I without initiating a Phase II procedure.

Law stated - 17 May 2023

SUBSTANTIVE ASSESSMENT

Substantive test

What is the substantive test for clearance?

The currently applicable substantive test is the test to ascertain whether there exists a creation or strengthening of a dominant position. On this basis, a merger is to be cleared based on one of the following two criteria:

- the undertakings involved do not create or strengthen a dominant position eliminating effective competition in the relevant market; or
- competition in another market is enhanced by the merger and the improvement outweighs the harmful effects resulting from the creation or strengthening of the dominant position in the relevant market.

The substantive test as such is not directly affected by special circumstances. For example, a failing company defence is taken into account by the Competition Commission (ComCo) as part of the causality test (ie, the concentration must be causal to the creation or strengthening of the dominant position).

According to ComCo's past practice, a failing company defence is possible if one or more parties to the concentration would disappear from the market within a short time without external support, the other parties would absorb most of or all the market shares of the disappearing company, and there is no solution that is less harmful to competition than the proposed concentration.

For compelling public reasons (employment or regional development), a concentration of undertakings that has been prohibited by ComCo may be authorised by the Federal Council at the request of the undertakings.

The ongoing revision of the Federal Act on Cartels and Other Restraints of Competition (CartA) seeks to adopt the significant impediment to effective competition test as the relevant standard for merger control. The final provisions are expected to come into force in 2024 at the earliest.

Law stated - 17 May 2023

Is there a special substantive test for joint ventures?

The CartA and the Ordinance on the Control of Concentrations of Undertakings do not provide for any specific substantive rules with respect to joint ventures.

Law stated - 17 May 2023

Theories of harm

What are the 'theories of harm' that the authorities will investigate?

The substantive test for clearance in Switzerland is that of market dominance. Applying this test, ComCo also investigates coordinated effects in cases of oligopolies and unilateral effects. In addition, ComCo examines conglomerate effects and vertical foreclosure.

Law stated - 17 May 2023

Non-competition issues

To what extent are non-competition issues relevant in the review process?

As a rule, ComCo does not take into consideration non-competition issues in reviewing a merger; however, as the collapse of Swissair and decisions in agricultural markets in particular have shown, political considerations may have some impact on how swiftly ComCo takes its decisions.

In connection with a merger involving banks, the Swiss Financial Market Supervisory Authority (FINMA) has the power to clear a merger that it deems necessary for reasons of creditor protection, which takes precedence over competition issues. In those cases, FINMA replaces ComCo, which is given a right of consultation only. This provision was applied for the first time in the ongoing merger between UBS and Credit Suisse.

Law stated - 17 May 2023

Economic efficiencies

To what extent does the authority take into account economic efficiencies in the review process?

ComCo takes – to a certain extent – economic efficiencies into account. It assesses whether and to what extent efficiency gains may positively affect competition, and whether those gains are passed on to the consumers. Further, economic efficiency gains in one market may outweigh certain deficiencies of the merger in another.

As an example, (input) foreclosure effects of a transaction could lead to higher consumer prices if a vertically integrated company ceases to supply the downstream markets; however, according to ComCo, possible efficiency gains of the transaction should be balanced against (input) foreclosure effects as they could lead to lower consumer prices (see Goldman Sachs/Altor/Hamlet).

Law stated - 17 May 2023

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

To the extent that the undertakings involved do not comply with an order of the Competition Commission (ComCo) prohibiting a merger, ComCo can take all appropriate measures to reinstate effective competition. These measures include the cancellation of the merger transaction and the termination of control by the acquiring undertaking over the target.

Law stated - 17 May 2023

Remedies and conditions

Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The clearance of a proposed merger may be subject to certain conditions or obligations designed to safeguard effective competition. Swiss law does not specify the types of conditions or obligations that may be attached. Recent cases have shown that conditions and other remedies will generally be discussed by the undertakings concerned with ComCo; these remedies could involve divestments or certain behavioural undertakings.

Law stated - 17 May 2023

What are the basic conditions and timing issues applicable to a divestment or other remedy?

The divestment must eliminate all of ComCo's material objections to the proposed merger. According to ComCo, the divestment must be completed within a fixed period; it is not sufficient for the parties to commit to divest at the earliest possible stage. A specific deadline must be offered.

In international filings, it is important to coordinate the divestments to be proposed to other merger control authorities that are involved, namely the European Commission.

To date, proposals for remedies have only rarely been offered by the parties in a Phase I investigation.

Law stated - 17 May 2023

What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Remedies have been required in relatively few foreign mergers. In parallel filings with the European Commission, the remedies offered to the European Union were also recognised and accepted by ComCo.

Law stated - 17 May 2023

Ancillary restrictions

In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

In general, ComCo only deals with ancillary restraints, in particular non-compete obligations that are directly related and necessary to the merger. ComCo's case practice, by and large, is in line with the European Commission's Notice on Ancillary Restraints. Other arrangements related to the merger are, in most cases, explicitly excluded from the clearance decision. If the parties have doubts about the legality of the arrangements not covered by the clearance decision, they have the option to submit the arrangement to the competent competition authorities for a formal or informal ruling.

Law stated - 17 May 2023

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

Are customers and competitors involved in the review process and what rights do complainants have?

In most cases, the Competition Commission (ComCo) will send out questionnaires to customers and competitors soliciting their opinions on a filed merger; however, customers and competitors have no formal procedural rights and ComCo is neither required to issue questionnaires nor bound by any answers submitted.

If ComCo decides to open investigation proceedings (Phase II of the procedure), it publishes the principal terms of the merger and gives third parties the right to state their position with respect to the proposed merger within a certain time frame. Third parties must submit their statements in writing.

Since 2008, ComCo has changed its previous practice so that third-party hearings (of competitors in particular) are, in principle, held in the presence of the participating undertakings. Third parties also have the right to access the file. On appeal, however, third parties have no such rights. In particular, according to the case law of the Federal Supreme Court, third parties are not entitled to any remedies against a ComCo decision to permit or prohibit a merger.

Law stated - 17 May 2023

Publicity and confidentiality

What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The mere filing of a notification is not made public; however, the decision to open investigation proceedings (Phase II), as well as the final decision of ComCo authorising or prohibiting a merger, are published in both the Official Federal Journal and the Official Commercial Gazette.

As the involvement of third parties in the investigation procedure is limited, there are no specific competition law provisions regarding the protection of business secrets. The merging parties are advised to specifically identify sensitive business information and ask ComCo to keep such information strictly confidential. ComCo is bound not to disclose any business secrets.

Law stated - 17 May 2023

Cross-border regulatory cooperation

Do the authorities cooperate with antitrust authorities in other jurisdictions?

The agreement between Switzerland and the European Union concerning cooperation on the application of their competition laws provides a framework for closer coordination of their respective enforcement activities.

With regard to merger control, the scope of the agreement includes, in particular, mutual notifications of merger investigations; the coordination of merger enforcement activities, such as aligning the conditions and obligations for the approval of a merger; and the exchange of information obtained in merger investigations.

The implementation of the agreement was accompanied by an amendment to the Federal Act on Cartels and Other Restrictions of Competition, through which the parties will be informed about and have the right to comment on ComCo's decisions to share the parties' information with foreign competition authorities.

Moreover, Switzerland and Germany signed an administrative agreement on cooperation between their competition

authorities on 1 November 2022, which is expected to enter into force in September 2023 at the earliest. The agreement aims to ensure the efficient enforcement of competition law in cross-border situations. For this purpose, the agreement will enable future cooperation between ComCo and the German Federal Cartel Office, including the exchange of information in merger proceedings. Since the thresholds for a merger control filing are higher in Switzerland than in Germany, the exchange of information in the area of merger control is likely to have little impact from a Swiss perspective.

Law stated - 17 May 2023

JUDICIAL REVIEW

Available avenues

What are the opportunities for appeal or judicial review?

Decisions of the Competition Commission (ComCo) are subject to appeal to the Federal Administrative Court. The decision of the Federal Administrative Court is in turn subject to review by the Federal Supreme Court; however, third parties have no right of appeal against merger decisions.

According to the Federal Supreme Court, parties to a joint venture are not obliged to jointly appeal against a ComCo prohibition decision; hence, an appeal by just one party is sufficient.

Law stated - 17 May 2023

Time frame

What is the usual time frame for appeal or judicial review?

An appeal against ComCo decisions must be filed with the Federal Administrative Court within 30 days of the formal notification of the decision. The duration of this appeal procedure varies but may well be more than one year.

Decisions of the Federal Administrative Court may be appealed to the Federal Supreme Court within 30 days of the formal notification of the decision. According to recent practice, these proceedings generally take more than one year.

Law stated - 17 May 2023

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2022, the Competition Commission (ComCo) received 49 merger notifications, a significant increase from previous years. ComCo did not have any objections to any of these 49 merger notifications after the preliminary examination (Phase I).

Regarding the filing obligations, ComCo is increasingly scrutinising transactions that have very little connection to Switzerland and applies exceptions to the filing obligations very narrowly.

Law stated - 17 May 2023

Reform proposals

Are there current proposals to change the legislation?

The Federal Council intends to implement a partial revision of the Federal Act on Cartels and Other Restrictions of Competition (CartA). The core element of the intended revision is the modernisation of the Swiss merger control regime by changing the current qualified market dominance test to the significant impediment to effective competition test. A draft for the revised CartA is being prepared and is expected to be put to the Federal Assembly in the second quarter of 2023. The Federal Assembly may change or reject the proposed revision in the political debate.

If the Federal Assembly agrees on the revisions, the changes to the merger control regime are not expected to come into force before 2024.

Law stated - 17 May 2023

UPDATE AND TRENDS

Key developments of the past year

What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The ongoing takeover of Credit Suisse by UBS is the first case in which the Swiss Financial Market Supervisory Authority (FINMA) has replaced the Competition Commision (ComCo) as the competent authority to review the merger. The change of competence took place because Credit Suisse was in danger of failing and creditor interests were at stake.

Although FINMA approved the early completion of the takeover on 19 March 2023, this does not mean that an assessment of the takeover under Swiss competition law has been waived. The actual merger control procedure begins with the merger filing notification by UBS. UBS will also have to file various merger notifications in other jurisdictions, such as in the European Union and the United States. In Switzerland, FINMA will carry out this assessment, involving ComCo in the process of the evaluation of the relevant data on the effects of the acquisition on the markets in Switzerland; however, FINMA is exceptionally competent in Switzerland to definitively approve the pre-approved acquisition or to approve the merger with conditions and obligations.

ComCo did not conduct any Phase II merger investigations in 2022. The focus of the Swiss merger control regime was on foreign-to-foreign transactions. The Secretariat of ComCo confirmed its strict interpretation of the notification obligation for foreign-to-foreign transactions.

Finally, the Federal Council intends to implement a partial revision of the Federal Act on Cartels and Other Restrictions of Competition (CartA). The core element of the intended revision is the modernisation of the Swiss merger control regime by changing the current qualified market dominance test to the significant impediment to effective competition test. A draft for the revised CartA is being prepared and is expected to be put to the Federal Assembly in the second quarter of 2023. The Federal Assembly may change or reject the proposed revision in the political debate. If the Federal Assembly agrees on the revisions, the changes to the merger control regime are not expected to come into force before 2024.

Law stated - 17 May 2023

Jurisdictions

Albania	Wolf Theiss
Australia	Allens
Austria	Freshfields Bruckhaus Deringer
Belgium	Freshfields Bruckhaus Deringer
Bosnia and Herzegovina	Wolf Theiss
Brazil	TozziniFreire Advogados
Bulgaria	Boyanov & Co
Canada	McMillan LLP
China	Freshfields Bruckhaus Deringer
Costa Rica	Zurcher Odio & Raven
Croatia	Wolf Theiss
Cyprus	Antoniou McCollum & Co LLC
Czech Republic	Nedelka Kubáč advokáti
Denmark	Kromann Reumert
Egypt	Zulficar & Partners
European Union	Freshfields Bruckhaus Deringer
Faroe Islands	Kromann Reumert
Finland	Roschier, Attorneys Ltd
France	Freshfields Bruckhaus Deringer
Germany	Freshfields Bruckhaus Deringer
Ghana	Bentsi-Enchill Letsa & Ankomah
Greece	Vainanidis Economou & Associates
Greenland	Kromann Reumert
Hong Kong	Freshfields Bruckhaus Deringer
India	Shardul Amarchand Mangaldas & Co

Italy	Freshfields Bruckhaus Deringer
Japan	Freshfields Bruckhaus Deringer
Liechtenstein	Sele Frommelt & Partner Attorneys at Law
Malta	Camilleri Preziosi
Mexico	Creel García-Cuéllar Aiza y Enriquez SC
Morocco	UGGC Avocats
Netherlands	Freshfields Bruckhaus Deringer
New Zealand	Russell McVeagh
Nigeria	G Elias
Norway	Wikborg Rein
Pakistan	Axis Law Chambers
Peru	Payet Rey Cauvi Pérez Abogados
Poland	WKB Wiercinski Kwiecinski Baehr
Portugal	Gomez-Acebo & Pombo Abogados
Romania	Wolf Theiss
Saudi Arabia	Freshfields Bruckhaus Deringer
Serbia	Wolf Theiss
Singapore	Drew & Napier LLC
Slovakia	Wolf Theiss
Slovenia	Wolf Theiss
South Korea	Bae, Kim & Lee LLC
Spain	Freshfields Bruckhaus Deringer
Sweden	Mannheimer Swartling
Switzerland	Lenz & Staehelin
Taiwan	Yangming Partners

Turkey	ELIG Gurkaynak Attorneys-at-Law
Ukraine	Asters
United Arab Emirates	Freshfields Bruckhaus Deringer
United Kingdom	Freshfields Bruckhaus Deringer
USA	Davis Polk & Wardwell LLP
Vietnam	Freshfields Bruckhaus Deringer
Zambia	Corpus Legal Practitioners