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Switzerland

MERGER CONTROL

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This country-specific Q&A provides an overview of merger control laws and regulations applicable in Switzerland.

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SWITZERLAND
MERGER CONTROL

1. Overview

In brief, the Swiss merger control rules show two important characteristics: First, the **thresholds triggering an obligation to notify a concentration are very high**. Second, even if a notification is required, the **threshold for the authorities to intervene in a concentration is high** as well.

The Federal Act on Cartels and other Restraints of Competition (**Cartel Act**) and the Ordinance on the Control of Concentrations of Undertakings (Merger Control Ordinance, MCO) contain the relevant provisions for Swiss merger control procedures. The Swiss Competition Commission (**COMCO**) and its **Secretariat** are in charge of merger control procedures. The Secretariat conducts the investigations, on the basis of which the COMCO renders its decisions.

The COMCO has published a combined **explanatory note and form** for the notification of concentrations. There is also a **note by the Secretariat** on the notification and assessment practice of concentrations. Both documents are available in German, French and Italian at the website of the COMCO. Unlike other competition authorities, the COMCO has not adopted any guidelines on the substantive analysis of concentrations.

According to the Cartel Act, planned concentrations must be notified to the COMCO before their implementation if certain turnover thresholds are met. As compared to other jurisdictions, the thresholds in Switzerland are very high. This means that the COMCO deals with a relatively small number of notifications only. For instance, in 2022, 49 concentrations – significantly more than in previous years – have been notified to the COMCO, all of which were cleared in phase I. In comparison, Austrian law provides for much lower thresholds, which entails that the Austrian Federal Competition Authority received around 340 notifications, i.e., approximately 7 times more than the COMCO. However, the Swiss and Austrian populations are comparable and the Swiss GDP is even approx. 75% bigger than the Austrian GDP.

Regardless of the turnover-based thresholds, notification is mandatory if in a previous investigation the COMCO found that one of the involved undertakings has been held to be dominant in a market in Switzerland, and if the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof.

The notification triggers a process with a **preliminary and a main examination**. In the first phase (**phase I, initial review**), the COMCO examines within one month after receiving the notification whether there are indications that the planned concentration will create or strengthen a dominant position. If this is the case, an **extended review** (**phase II**) must be carried out. During the extended review, the COMCO verifies within four months, whether the concentration creates or strengthens a dominant position liable to eliminate effective competition and does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed. If this is the case, the COMCO prohibits the concentration or allows it subject to conditions or remedies.

A concentration of undertakings that has been prohibited by the COMCO may be authorized by the Swiss government (the Federal Council) at the request of the undertakings if, in exceptional cases, it is necessary for compelling public interest reasons. To date, no undertaking has ever filed a request for such an authorization, which is also due to the fact the COMCO hardly ever prohibits concentrations of undertakings.

2. Is notification compulsory or voluntary?

Filing is **compulsory** if a) the turnover thresholds are reached or b) one of the undertakings involved has been held to hold a dominant position in a relevant market in Switzerland. There is no possibility of a voluntary filing.

3. Is there a prohibition on completion or closing prior to clearance by the relevant

authority? Are there possibilities for derogation or carve out?

Closing and completion of a planned transaction are **prohibited at least for one month** after the notification. The legal effect of such a concentration is suspended. However, the COMCO may allow concentrations before the expiry of said deadline.

If the undertakings concerned are not informed within one month of the filing of the notification whether a further examination is to be carried out, the concentration is deemed authorized and can be completed.

In the event that the COMCO decides to carry out an extended review, the COMCO decides whether the concentration may **exceptionally be implemented** provisionally or whether it should remain suspended.

4. What types of transaction are notifiable or reviewable and what is the test for control?

The Cartel Act defines concentrations of undertakings as

a) **mergers** of two or more previously independent undertakings, or

b) any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement, by which one or more undertakings **acquire direct or indirect control** over one or more previously independent undertakings or parts thereof.

An undertaking acquires control over an undertaking if it is able to exercise a **decisive influence** over the activities of the previously independent undertaking by the acquisition of rights over shares or by any other means. The possibility to exercise influence is sufficient; an actual exercise of said control is not required.

Further covered is the **acquisition of joint control** by two or more undertakings over an undertaking (**joint venture**) which they have not previously jointly controlled and which fulfils on a lasting basis all the functions of an autonomous economic entity.

Since a concentration in terms of the Cartel Act relates to concentrations of previously independent undertakings, concentrations of undertakings that belong to the same group are not subject to the merger control rules.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable?

In principle, an acquisition is notifiable and reviewable if an undertaking acquires the ownership rights or rights to use all or parts of the assets of another undertaking.

In most cases, this is achieved either through the **acquisition of a majority interest** in an undertaking by means of a share deal, providing an undertaking with a majority (50% plus one vote) of the voting rights pertaining to another undertaking, or through the acquisition of assets and liabilities by means of an asset deal.

In case of an **acquisition of a minority interest** (i.e., below 50% plus one vote), a notification is required if an undertaking acquires rights or concludes agreements which confer a decisive influence on the composition, deliberations, or decisions of the organs of another undertaking. Often, this is achieved by means of shareholders' agreements, but also, e.g., through cooperation agreements. In addition, a minority interest may result in control over another undertaking on the basis of the relevant articles of associations, e.g., if the articles of association provide certain shares with special voting rights.

Furthermore, the acquisition of a minority interest might be notifiable even without such additional elements. Especially in cases of corporations with a **dispersed circle of shareholders**, of which a certain "stable" part does not attend the general meetings, a minority interest might result in an acquisition of control if the minority shareholder disposes of a stable majority in the general meetings.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

Any planned concentrations must be notified to the COMCO if in the financial year preceding the concentration:

· the undertakings concerned **together** reported a **global turnover of at least CHF 2 billion**, or **a Swiss turnover at least CHF 500 million**;

and (cumulatively)

· at least two of the undertakings concerned each reported a Swiss turnover of at least CHF 100 million.

For **insurance companies**, the annual gross insurance premium income is relevant. For **banks** and other financial intermediaries subject to the accounting regulations pursuant to the Banking Act, the gross income is relevant.

Regardless of these thresholds, notification is mandatory if the **COMCO held one of the undertakings concerned in a final and non-appealable decision to be dominant** in a market in Switzerland, and if the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

To **determine the turnover**, all amounts derived by the undertakings concerned from the sale of products and the provision of services within the ordinary business activities in the preceding financial year must be taken into account. Discounts, rebates, VAT, other consumption taxes and other taxes directly related to turnover must be deducted from these amounts.

Financial years that do not cover a full 12-month period must be converted to a full financial year based on the average turnover of the recorded months. For **insurance companies**, the annual gross insurance premium income is relevant (see article 6 MCO). For **banks and other financial intermediaries** subject to the accounting regulations pursuant to the Banking Act, the gross income is relevant (see article 8 MCO).

For all participating undertakings, turnovers consist of the aggregated turnover from their own business activities and the turnover of their **subsidiaries, parent companies, sister companies and joint venture companies** (as defined in article 5 para. 1 MCO). The turnover of a joint venture controlled by the undertakings concerned shall be allocated equally. The turnover from business activities between these undertakings (intra-group turnovers) shall not be taken into account.

To the extent that these thresholds refer to the turnover in Switzerland, the turnover with customers located in Switzerland must be calculated. In other words, the place of performance (which may deviate from the place of performance agreed in a contract such as the named place under agreed Incoterms®) respectively the place where an undertaking competes with other undertakings for serving a customer is relevant. The place from where customers are invoiced is not decisive. If, e.g., a multinational corporation has its central purchasing organisation in Switzerland, the turnover will be allocated to Switzerland only if the place of performance is in Switzerland.

8. Is there a particular exchange rate required to be used to convert turnover and asset values?

Turnover in foreign currencies shall be converted into **Swiss francs (CHF)**. In practice, the annual average exchange rates published by the Swiss National Bank are used for that purpose.

If the financial year does not correspond to the calendar year, the applicable annual average exchange rate shall be calculated on the basis of the monthly average exchange rates published by the Swiss National Bank by dividing the sum of the relevant monthly exchange rates within the financial year by 12.

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

The merger control rules apply to joint ventures as well. Notification to the COMCO of a joint venture is required where two or more undertakings acquire joint control of an **existing undertaking** that they did not previously jointly control, if that joint venture performs all the functions of an autonomous economic entity on a lasting basis.

If two or more undertakings establish a **new undertaking** that they intend to jointly control, the joint venture requires notification if the joint venture performs all the functions of an autonomous economic entity on a lasting basis and if business activities from at least one of the controlling undertakings are transferred to the joint venture.

If a joint venture is notifiable, the turnover of all controlling undertakings must be taken into consideration when determining whether the notification thresholds are met.

There is no statutory definition of "**joint control**". However, joint control must be understood as negative control, meaning that each shareholder must have the possibility to block the decision-making of a joint venture at least with regard to strategic matters of business policy. Joint control usually exists if a joint venture is held by two 50% shareholders. The possibility of

changing coalitions between minority shareholders will normally exclude the assumption of joint control. In order for joint control to exist, each shareholder must therefore be required to actively consent to, or at least passively tolerate, decisions of the joint venture.

In other words, joint control implies that shareholders have veto rights, which must relate to strategic decisions on the business policy of the joint venture. Such veto rights must go beyond the rights usually accorded to minority shareholders in order to protect their financial interests as investors in a joint venture. This normal protection of minority shareholders relates to decisions on the essence

of the joint venture, such as changes in the articles of association, capital increases or decreases or the liquidation of the joint venture. Veto rights, for example, which allow a shareholder to block a sale of the joint venture, are not sufficient to establish joint control. Veto rights relating to strategic decisions on the business policy of a joint venture, which confer joint control, typically include decisions on issues such as the budget, business plan, major investments or the appointment of senior management.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

In principle, a concentration to be implemented in different stages may be considered as a single transaction for merger control purposes if certain requirements are met. Most importantly, the different stages of the concentration must be interdependent in such a way that the stages must be conditional on each other. In other words, the different stages must relate to a **single economic event**.

In case several undertakings acquire joint control over joint venture and such joint control is converted into sole control by one undertaking based on a legally binding agreement, the concentration will be considered as a single economic event if joint control is limited to a maximum period of **one year**, meaning that a single notification is sufficient. If joint control lasts more than one year, separate notifications are generally required.

11. How do the thresholds apply to “foreign-to-foreign” mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?

The thresholds are the same for “foreign-to-foreign” mergers and transaction as well as transactions, which involve a Swiss-based undertaking.

In order for a “foreign-to-foreign” concentration to be notifiable, at least two of the undertakings concerned must each report a turnover in Switzerland of at least CHF 100 million. This high threshold excludes concentrations without a sufficient nexus to the Swiss market.

In principle, the same also holds true for joint ventures. In case of a new joint venture, it is decisive whether the Swiss turnovers of at least two controlling undertakings exceed CHF 100 million.

Exceptions may exist if a joint venture does not carry out any activities nor generates any turnover in Switzerland. However, the obligation to submit a notification does not apply only if the activity of the joint venture obviously has no effect on competition in Switzerland, meaning that any effect on competition in Switzerland must be obviously excluded. In case of doubt, a notification shall be filed.

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

Not applicable (no voluntary filing regime exists).

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

In the **initial review** (**phase I**), the COMCO decides whether an in-depth investigation (phase II review) has to be carried out. Phase II reviews are necessary if the initial review reveals indications that a concentration creates or strengthens a dominant position.

During the **extended review** (**phase II**), the COMCO investigates within four months whether the concentration creates or strengthens a dominant position liable to eliminate effective competition and does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed. This threshold to intervene is higher than the Significant Impediment to Effective Competition (SIEC) test which is predominant in the European Union. In Switzerland, a monopoly-like

situation would have to result from a concentration. Only in such cases, the COMCO has the possibility to insist on conditions and remedies or, if this is not sufficient, to prohibit a concentration.

If a concentration of banks 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, the FINMA takes the place of the COMCO, which it shall invite to submit an opinion. In 2023, the early implementation of the historic, extraordinary takeover of Credit Suisse by UBS – two out of the 30 Global Systematically Important Banks (G-SIBs) – was authorized by the FINMA on that basis.

14. Are factors unrelated to competition relevant?

In the proceedings before the COMCO, such factors unrelated to competition are generally **not relevant**.

However, a concentration of undertakings that has been prohibited by the COMCO may be authorized by the Federal Council at the request of the undertakings if, in exceptional cases, it is necessary for **compelling public interest reasons**. To date, no undertaking has ever filed a request for such an authorization.

Moreover, if a concentration of banks is deemed necessary by the FINMA for reasons related to **creditor protection**, the interests of creditors may be given priority. In that regard, the historic, extraordinary takeover of Credit Suisse by UBS in 2023 can be mentioned.

15. Are ancillary restraints covered by the authority's clearance decision?

Ancillary restraints are examined in the context of merger control and covered by the COMCO's clearance decision, if they are directly **connected** with the concentration and **necessary** and if the undertakings concerned e**xplicitly and specifically request** the COMCO to do so.

Non-competition obligations are an important example for such ancillary restraints. In principle, the COMCO follows the approach of the European Commission, according to which non-competition clauses are justified for periods of up to three years, when the transfer of an undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how. When only goodwill is included, they are justified for periods of up to two years.

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

The Cartel Act does not stipulate a deadline for notifying an intended concentration. However, the notification must be submitted before the implementation of the concentration. A violation of this obligation ("gun jumping") may lead to fines of up to CHF one million in accordance with article 51 Cartel Act.

Moreover, if a concentration that should have been notified has been implemented without due notification, the merger control procedures are initiated ex officio. If the concentration is prohibited, the undertakings concerned are required to take the necessary steps to restore effective competition.

17. What is the earliest time or stage in the transaction at which a notification can be made?

There is no limitation by the Cartel Act to early filings as long as the undertakings are **seriously interested** in the concentration and the notification contains all necessary data. Usually, notifications are submitted after signing of the relevant transactions (e.g., the share or asset purchase agreement).

In the case of a public takeover offer, the notification must be submitted immediately after publication of the takeover offer. However, it can also be submitted before the publication of such a takeover offer.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

Pre-notification discussions are **common and welcomed** by the Secretariat of the COMCO.

Undertakings can submit a draft notification to the Secretariat. The Secretariat will then evaluate and confirm whether the draft notification is complete. This is important from a timing perspective:

Within ten days as from the filing of a notification, the Secretariat shall provide a confirmation that it has received a notification and that it is complete. In cases where the information or documents are incomplete, the Secretariat requests the undertakings concerned to submit supplementary information. The Secretariat exercises significant discretion when deciding whether a notification is complete. The time limits for a phase I

review (i.e., one month) respectively a phase II review (i.e., four months) commence upon receipt of a complete notification only. Therefore, the submission of incomplete notifications can delay the closing of a concentration, which may be avoided through pre-notification discussions.

Pre-notification discussions are covered by the CHF 5,000 flat fee for the initial (phase I) review, provided that a notification is submitted. If the undertakings concerned refrain from submitting a notification, the pre-notification discussions will be invoiced separately.

19. What is the basic timetable for the authority's review?

As mentioned above, the merger control procedure is divided into the initial review and the extended review.

The **initial review**, in which it is examined whether there are indications that a concentration creates or strengthens a dominant position, is completed by the COMCO within **one month** after receipt of the notification. The period begins on the day following receipt of the complete notification. If the undertakings concerned do not receive within this one-month period a notification that an extended review will be conducted, the concentration can be implemented without further ado.

The **extended review** (if any), in which the COMCO verifies in detail whether a concentration creates or strengthens a dominant position liable to eliminate effective competition and not outweighed by an improvement of the conditions of competition in another market, then has to be completed within **four months**.

20. Under what circumstances may the basic timetable be extended, reset or frozen?

Extensions are only possible in phase II, i.e., during the extended review of a concentration which lasts four months. An extension is permissible only if the COMCO is prevented from carrying out the investigation due to circumstances **imputable to the undertakings** involved.

Such circumstances may be, e.g., a failure of the undertakings concerned to disclose to the Secretariat, within the deadline set by the Secretariat, such additional information and documents as may be relevant for the phase II examination of the planned concentration.

21. Are there any circumstances in which the review timetable can be shortened?

The timetable is set forth in article 32 et seq. of the Cartel Act and generally fixed. The COMCO may, however, permit the undertakings concerned to implement the concentration prior to the expiry of the one-month deadline in the phase I review respectively the four-month deadline in case of a phase II review by notifying the parties that it considers the concentration as unproblematic ("*comfort letter*").

22. Which party is responsible for submitting the filing?

In case of a **merger**, the filing must be jointly submitted by the undertakings concerned.

In the case of an **acquisition of control**, the notification must be submitted by the undertaking who acquires control over an undertaking, respectively jointly by all undertakings who acquire joint control over a joint venture.

With regard to **joint ventures**, the following additional remark is noteworthy: If a joint venture acquires sole control over an undertaking, the joint venture and the undertaking to be acquired constitute the undertakings concerned. However, if (i) the joint venture has been established specifically for the acquisition of another undertaking (e.g., a "BidCo"), (ii) does not perform all the functions of an autonomous economic entity on a lasting basis, (iii) constitutes an association of undertakings or (iv) the parent companies are the "real" actors behind a concentration, these parent companies will be considered to be the undertakings concerned, meaning that their turnovers will have to be taken into account.

In case of a joint notification, the notifying undertakings must designate at least one representative, who may represent all the undertakings concerned.

If notifying undertakings or their representatives are domiciled abroad, they are obliged to designate an address in Switzerland where documents can be validly served.

23. What information is required in the filing form?

According to Article 11 MCO, the notification shall contain at least the following information:

a. **name, domicile and a brief description of the**

business activities of the undertakings that are to be taken into account to ascertain whether the thresholds are met, and of the seller of the shares;

b. a **description of the planned concentration**, of the relevant facts and circumstances, and of the goals that are being pursued by the planned concentration;

c. the **turnover**, balance sheet totals or gross premium income of the undertakings concerned, and the amounts allocated to Switzerland;

d. **information on all product and geographic markets that are affected** by the concentration and in which two or more of the undertakings concerned jointly hold a market share of 20% or more in Switzerland or in which one of the undertakings concerned holds a market share of 30% or more in Switzerland, and a description of these markets containing at least information on the distribution and demand structures and on the importance of research and development;

e. with regard to the markets affected, the **market shares of the undertakings** concerned for the preceding three years and, if known, for each of the three principal competitors as well as an explanation of the basis used for calculating the market shares;

f. for the markets affected, **information regarding undertakings that have newly entered the market** in the preceding five years and undertakings that might enter these markets within the next three years and, if possible, the costs that would arise from an entry into the market.

Notifications shall be submitted in one of the official languages of Switzerland, i.e., German, French or Italian.

24. Which supporting documents, if any, must be filed with the authority?

The following documents must be filed together with the notification:

1. copies of the **most recent annual accounts and annual reports** of the undertakings concerned;

2. copies of the **agreements** that effect the concentration or that are otherwise connected with it;

3. in the case of a public offer, copies of the **offer documentation**;

4. copies of the **reports, analyses and business plans made with regard to the concentration** insofar as they contain information relevant to the assessment of the concentration.

In case a concentration is notifiable in the European Union as well, it is common to also submit the (draft) Form CO.

Unlike the notification, accompanying documents may also be submitted in English.

25. Is there a filing fee?

For the initial review (**phase I**) a **flat fee of CHF 5,000** is charged. The flat fee also covers any pre-notification discussions.

If the COMCO decides to conduct an extended (**phase II**) review, the fee is based on the time spent, whereby an **hourly rate of CHF 100 to 400** applies. In recent cases, phase II reviews resulted in fees of approx. CHF 100,000-300,000.

26. Is there a public announcement that a notification has been filed?

No, there is **no public announcement that a notification has been filed**.

However, the **decision of the COMCO to carry out an extended review (phase II) is published** in the Federal Gazette as well as in the Swiss Official Gazette of Commerce (SOGC). This publication contains the name, domicile and business activities of the undertakings concerned and a brief description of the concentration as well as the period during which third parties may submit comments on the planned concentration.

27. Does the authority seek or invite the views of third parties?

The **COMCO may require information from third parties** which may be relevant for the assessment of the proposed concentration. To that end, the third parties may be informed of the proposed concentration while maintaining the business secrets of the undertakings involved. These third parties are obliged to provide the COMCO with all information necessary for its assessment and to submit the necessary documents.

As mentioned, third parties may also express their views on the proposed concentration on a voluntary basis after publication of the planned concentration in the Federal Gazette as well as in the Swiss Official Gazette of Commerce (SOGC).

28. What information may be published by the authority or made available to third parties?

The **decision of the COMCO to carry out an extended review** is published in the Federal Gazette as well as in the Swiss Official Gazette of Commerce (SOGC) and contains the names, domiciles and business activities of the undertakings concerned and a brief description of the concentration as well as the period during which third parties may submit comments on the planned concentration.

Upon completion of the extended review, the Secretariat publishes the decision of the COMCO in the Federal Gazette and the Swiss Official Gazette of Commerce (SOGC). The publication contains the name and domicile of the undertakings concerned, a brief description of the planned concentration, a summary of the grounds for the decision and the decision itself.

Finally, the **reasoned decisions of initial reviews and extended reviews** of the COMCO are usually published on the website of the COMCO as well as in the COMCO's periodical "Law and Policy on Competition".

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

The COMCO actively participates in different **networks of competition authorities** such as the Competition Committee of the Organisation for Economic Co-operation and Development (**OECD**) or the International Competition Network (ICN). Due to the lack of a legal basis, these networks essentially focus on the exchange of knowledge and experience.

Moreover, in December 2014, the Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws entered into force. This agreement enables the COMCO and the European Commission respectively its Directorate-General for Competition (DG COMP) to notify and coordinate enforcement activities and to exchange information. Such enforcement activities include concentrations in which a party to the transaction and/or an undertaking controlling a party to the transaction is incorporated or organised under the laws and regulations applicable in Switzerland respectively the European Union. In such cases, notifications shall be given by the COMCO to the European Commission upon the initiation of an extended review (phase II).

Switzerland signed a similar bilateral agreement with Germany in November 2022. It entered into force on 1 September 2023 and also states that certain notifications shall be given by the COMCO to the German Federal Cartel Office upon the initiation of a phase II review.

Additional similar bilateral cooperation agreements will likely be concluded with other countries in the future.

30. What kind of remedies are acceptable to the authority?

The COMCO may **prohibit** a concentration or authorise it subject to **conditions and remedies** that either have to be implemented before or after the concentration

The Cartel Act does not specify the kind of conditions and remedies the COMCO may demand. Conditions and remedies could, e.g., involve **divestments** within a fixed period or **behavioural undertakings** (e.g., access remedies).

In cases where an authorization to implement a concentration is granted in connection with a public offer, the COMCO may order, in particular, that the voting rights acquired by the offeror be used solely for the preservation of the value of its investment.

31. What procedure applies in the event that remedies are required in order to secure clearance?

Once a need for conditions and remedies is foreseeable, the COMCO may **invite the undertakings concerned to propose suitable conditions and remedies**, which will then be evaluated and discussed between the COMCO and the undertakings concerned.

Ultimately, however, conditions and remedies will be **ordered by the COMCO unilaterally** in the operative part of its decision to authorize a concentration subject to conditions and remedies. The detailed wording of the conditions and remedies may also be attached to the COMCO's decision.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

Both **administrative fines and criminal sanctions** exist, in particular for cases of "gun jumping".

Any undertaking that

1. implements a concentration that should have been notified without filing a notification,

2. fails to comply with the obligation not to implement a concentration before its authorization,

3. fails to comply with a remedy attached to the authorization,

4. implements a prohibited concentration, or

5. fails to implement a measure intended to restore effective competition,

shall be charged with an a**dministrative fine of up to CHF one million** in accordance with article 51 Cartel Act. In case of a repeated failure to comply with a remedy linked to the authorization of a concentration, the undertaking shall be charged up to 10% of the total turnover in Switzerland achieved by the undertakings concerned.

In addition, any person (e.g., member of a corporate body) who implements a concentration that should have been notified without filing a notification, or who violates decisions relating to concentrations of undertakings may have to pay a **fine (criminal sanction) of up to CHF 20,000**.

Moreover, if a prohibited concentration has been implemented or if a concentration is prohibited after its implementation, the undertakings concerned are required to take the necessary steps to **restore effective competition**. The COMCO may require the undertakings concerned to make binding proposals as to how effective competition may be restored. If the undertakings concerned do not make any proposals despite being required to do, or if the proposals are not accepted by the COMCO, the COMCO may order the separation of any combined undertakings or assets, the cessation of a controlling influence or other measures to restore effective competition.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

An undertaking who fails to comply with an obligation to provide information or documents is liable to pay an **administrative fine of up to CHF 100,000**. In addition, any person (e.g., member of a corporate body) may have to pay a **fine (criminal sanction) of up to CHF 20,000**.

34. Can the authority's decision be appealed to a court?

The undertakings concerned may file an appeal against a decision of the COMCO to prohibit a concentration, or to authorize it subject to conditions or remedies only, before the **Federal Administrative Court** within a period of 30 days. Each undertaking concerned has standing to file an appeal on its own, i.e., the undertakings do not have to act jointly.

The decision of the Federal Administrative Court can be appealed before the **Federal Supreme Court** within a period of 30 days.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment

The **barriers to intervene in concentrations in Switzerland are high for several reasons**.

First, the turnover-based thresholds that trigger an obligation to notify a concentration are high.

Second, if a planned concentration reaches the turnover-based thresholds, the mere creation or strengthening of a dominant position on its own is not sufficient to block the concentration. In order for the COMCO to be able to intervene, the concentration must be liable to eliminate effective competition.

This threshold to intervene is higher than the SIEC test which is predominant in the European Union. In Switzerland, a monopoly-like situation would have to result from a concentration. Only in such cases, the COMCO has the possibility to insist on conditions and remedies or, if this is not sufficient, to prohibit a concentration. As a result, only a few concentrations have been prohibited to date. Indeed, in 2021 and 2022, no phase II review has been initiated at all.

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

In May 2023, the Swiss government (i.e., the Federal Council) has submitted a partial revision of the Cartel Act including the dispatch to the Swiss parliament. The merger control regime is one of the main elements of that intended partial revision.

More concretely, the partial revision shall replace the

current substantive assessment of concentrations, i.e., the assessment whether a concentration creates or strengthens a dominant position liable to eliminate effective competition, with the **Significant Impediment to Effective Competition (SIEC)** test. This would mean that the threshold for the COMCO to intervene in concentrations would be lowered. Under the SIEC test, already concentrations which significantly impede competition, in particular through the creation or strengthening of a dominant position, may justify an intervention by the competition authorities.

The high turnover-based jurisdictional thresholds shall remain unchanged, so that the number of notifications is expected to remain unaffected.

Furthermore, the draft revision provides that concentrations must no longer be notified to the COMCO if all product markets concerned by the concentration are defined geographically so as to encompass Switzerland and at least the European Economic Area and the concentration is examined by the European Commission. A copy of the notification filed with the European Commission would have to be submitted within 10 days to the COMCO.

Whether and when the new merger control regimes could enter into force is not yet predictable. Both chambers of the parliament first have to deliberate on the draft revision of the Cartel Act, which also addresses various further aspects (e.g., regarding the treatment of anticompetitive agreements, deadlines etc.) and agree on the adoption of a revision. Following such an adoption, the 100-day referendum period would have to be awaited before the Federal Council could bring the revision into force. Due to an institutional reform of the COMCO currently under consideration, further delays cannot be ruled out. For all these reasons, an introduction of the SIEC test into the merger control regime is rather unlikely to occur before 2026.

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