



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Switzerland: Merger Control

This country-specific Q&A provides an overview to merger control laws and regulations that may occur in Switzerland.

It will cover jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals as well as the author's view on planned future reforms of the merger control regime.

This Q&A is part of the global guide to Merger Control. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/merger-control-3rd-edition>

Country Author: Wenger Plattner

The Legal 500



**Dr. Fritz Rothenbühler,
Partner**

fritz.rothenbuehler@wenger-plattner.ch

The Legal 500



**Dr. Sébastien Gobat, Senior
Associate**

sebastien.gobat@wenger-plattner.ch

The Legal 500

1. Overview

Merger control is regulated in the Federal Act on Cartels and other Restraints of Competition (Cartel Act, Kartellgesetz) and the Ordinance on the Control of Concentrations of Undertakings (Merger Control Ordinance "MCO", Verordnung über die Kontrolle von Unternehmenszusammenschlüssen).

The main enforcement authority is the Swiss Competition Commission (ComCo, Wettbewerbskommission). The ComCo takes the decisions while its full-time Secretariat conducts the investigations. Parties have to submit notifications as well as pre-notifications to the Secretariat of the ComCo.

According to the Cartel Act, planned concentrations of undertakings must be notified to

the ComCo before their implementation if certain statutory turnover thresholds are reached.

The notification triggers a two-step assessment process:

- In a first phase (phase I, initial review), the ComCo decides within one month after receipt of the notification whether an investigation is to be carried out and informs the undertakings involved of its decision. An extended review (phase II) must be carried out if there are indications that the merger creates or strengthens a dominant position.
- During the second phase (phase II, extended review), the ComCo will have to verify 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 merger or allows it under certain conditions.

A specific feature is that a transaction may – irrespective of the turnover thresholds – be caught by Swiss Merger Control if one of the undertakings concerned has in proceedings under the Cartel Act in a final and non-appealable decision 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.

2. Is mandatory notification compulsory or voluntary?

The notification is compulsory, if a concentration exceeds the thresholds contained in the Cartel Act.

Intra-group transactions are exempt from merger control and are therefore not subject to notification.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation

or carve out?

The undertakings concerned must refrain from implementing the concentration at least for one month following the notification. As an exception, the merger may nevertheless be implemented if the ComCo approves the merger at the request of the companies for important reasons. Important reasons may include takeovers for restructuring if the bankruptcy of the acquired company is imminent if the acquirer cannot immediately take over operational and financial management.

If the ComCo does not inform within one month of the notification whether an examination is to be carried out, the merger can be implemented without reservation.

The legal effect of a concentration that has to be notified is suspended, subject to the expiry of the deadline of one month following the notification and any provisional authorisation to implement the concentration.

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

The Cartel Act defines concentration of undertakings as follows:

- the merger of two or more previously independent undertakings;
- 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 of one or more previously independent undertakings or parts thereof (acquisition of control). This includes the acquisition of joint control by two or more undertakings over an undertaking which they have not previously jointly controlled (joint venture) and which fulfils in the long term all the functions of an autonomous economic entity.

Acquisition of control means that an undertaking is able to exercise a decisive influence over the activities of the other undertaking by the acquisition of rights over shares or by any other means. The means of obtaining control may in particular involve the acquisition of the following, either individually or in combination:

- ownership rights or rights to use all or parts of the assets of an undertaking

- rights or agreements which confer a decisive influence on the composition, deliberations, or decisions of the organs of an undertaking.

As mentioned above, intra-group mergers are not notifiable.

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

As mentioned above, the acquisition of control is the decisive factor. Therefore, the acquisition of a minority interest must also be notified if it allows the undertaking to exercise control over another undertaking.

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

A planned concentration of undertakings has to be notified to the ComCo, if in the financial year preceding the concentration the following two turnover thresholds are reached:

- the undertakings concerned together reported a turnover of at least 2 billion Swiss francs, or a turnover in Switzerland of at least 500 million Swiss francs, and
- at least two of the undertakings concerned each reported a turnover in Switzerland of at least 100 million Swiss francs.

Even when the thresholds are not reached, a planned concentration has to be notified to the ComCo if one of the undertakings concerned has in proceedings under the Cartel Act in a final and non-appealable decision 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.

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

The decisive factors are the amounts derived by the undertakings concerned from the sale of products and the provision of services within the ordinary business activities of the undertakings concerned in the preceding financial year. All reductions such as discounts, rebates, value added tax and other consumption taxes as well as other taxes directly related to turnover are to be deducted.

Financial years that do not cover a full twelve month period shall be converted to a full twelve month period based on the average turnover of the recorded months.

For participating companies, turnovers consist of the turnover from its own business activities and the turnover of subsidiaries, parent companies, sister companies and joint venture companies (in this case, the sales are to be allocated equally to the participating companies). The turnover from business activities between these undertakings (intra-group turnovers) shall not be taken into account.

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

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.

In practice, the annual average exchange rates based on the exchange rates provided by the Swiss National Bank are used for the conversion.

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

Where control of a joint venture is exercised by two or more undertakings which previously did not jointly control it, a notification to the ComCo is required, if the joint venture performs all the functions of an autonomous economic entity on a lasting basis. If a joint venture is newly founded by two or more companies, a notification to the ComCo is only necessary if, in addition, the business activities of at least one of the controlling undertakings are transferred to the joint venture.

A separate merger filing is not required, if the joint control exists only for a very limited period of up to one year during the starting-up period of the joint venture.

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

Generally, no. With regard to the calculation of the turnover thresholds, where two or more control transactions take place within two years between the same undertakings, these transactions must be regarded as a single concentration.

11. In relation to “foreign-to-foreign” mergers, do the jurisdictional thresholds vary?

In principle, the sales thresholds also apply to "foreign-to-foreign" mergers. However, according to the practice of the ComCo, in exceptional cases there is no reporting obligation because of the absence of effects in Switzerland. This concerns cases in which joint ventures have neither activities nor sales in Switzerland (e.g. no deliveries are made to Switzerland) and such activities are neither planned nor expected in the future.

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.

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?**

Upon receipt of notification of a merger, the ComCo decides within one month whether an investigation is to be carried out and informs the undertakings involved of its decision (phase 1, Initial Review). An extended review (phase II) must be carried out if there are indications that the merger creates or strengthens a dominant position.

During the extended review, the ComCo will have to verify 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. In this context, the ComCo also takes account of any market developments and the position of the undertakings in relation to international competition.

With regard to the dominant position, a distinction must be made between individual dominance and collective dominance:

- The question of whether an individual dominant position exists is assessed on the basis of the interaction between current competition (market shares and market concentration), potential competition (barriers to entry) and the position of the opposing market.
- The question of whether a collective dominant position exists is assessed in a two-stage assessment. In a first step, the ComCo carries out a behavioural analysis and examines the market and the parties' previous behaviour for signs of coordinated behaviour. In a

second step, the ComCo analyses whether parallel behaviour on the market is likely after the merger. In this respect, it is oriented towards the criteria of market concentration, market transparency, market stability, symmetries, the position of the opposite market side and any interdependencies and vertical integrations.

By concentrations of banks, the interests of creditors may be given priority. In these cases, FINMA takes the place of the ComCo, which it shall invite to submit an opinion.

The ComCo shall complete its investigation within four months. If the ComCo comes to the conclusion that the concentration creates or strengthens a dominant position, it may prohibit the concentration or authorise it subject to conditions and obligations.

14. Are factors unrelated to competition relevant?

Not applicable.

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

According to the praxis of the ComCo, ancillary restraints such as non-competition clauses, licensing agreements, supply and delivery obligations are also examined in the context of merger control and therefore covered by the ComCo's decision, if they are directly connected with the implementation of a merger project and are necessary for it.

However, agreements that are not directly and necessarily connected with the merger will be examined in a separate antitrust procedure (unlawful agreements affecting competition and unlawful practices by dominant undertakings, see article 5 and 7 Cartel Act).

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

The Cartel Act does not provide for a deadline for notifying a proposed concentration. In any case, however, the notification must be submitted before the implementation of the concentration.

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

In general, the notification is made after the conclusion of the purchase agreement. However, it is also possible to notify the proposed concentration at an earlier stage, e.g. at the conclusion of a letter of intent or a memorandum of understanding. In this case, the notifying parties have to credibly demonstrate that the participating undertakings are willing to conclude the purchase agreement. Either way the notification has to contain all information and documents required by the MCO.

In the case of a public takeover offer, the notification must be submitted immediately after publication of the takeover offer.

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

Undertakings may hand in a draft of the notification to the Secretariat of the ComCo. Based on the information and documents the undertakings handed in, the Secretariat evaluates the draft of the notification and in particular assesses whether the documents are complete. There is no time limit for this evaluation.

Especially in the case of extensive and complex merger projects it is recommended to contact the ComCo prior to notification. In regard to the short time available to the ComCo for the preliminary (phase I, initial review, one month) and extended (phase II,

extended review, four months) examination of a merger project, such a pre-notification discussion is appreciated by the ComCo.

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

As mentioned above, the merger control procedure can be divided into two phases.

The first phase (initial review), in which the ComCo examines whether there are indications that the merger creates or strengthens a dominant position has to be completed within one month after receipt of the notification. The period begins on the day following receipt of the complete notification and expires the following month at the end of the same numerical day as the day upon which the period commences or – if this day does not exist in the following months – on the last day of such month. If the undertakings concerned do not receive notification within this one month period, the merger can be implemented without reservation.

The second phase (extended review), in which the ComCo verifies whether the concentration creates or strengthens a dominant position has then to be completed within four months.

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

Extensions are only possible in the second phase, which lasts four months and only for reasons attributable to the undertakings concerned. This includes, for example, an extension of the examination phase with the consent of the parties, e.g. in order to find possible remedies.

21. **Are there any circumstances in which the review timetable can**

be shortened?

The timetable is defined by law and cannot be shortened.

22. Which party is responsible for submitting the filing?

In case of a merger, the notification of a planned concentration must be made jointly by the undertakings concerned. In the case of an acquisition of control, the notification must be made by the undertaking(s) acquiring control.

In case of joint notification, the notifying undertakings shall designate at least one joint representative.

Notifying undertakings or their representatives domiciled or residing abroad shall designate an address in Switzerland for service of documents.

23. What information is required in the filing form?

The content of the notification is regulated in detail in the MCO. Pursuant to the latter, the notification shall contain at least the following information:

- name, domicile and a brief description of the business activities of the undertakings and of the seller of the shares;
- a description of the planned concentration, of the relevant facts and circumstances, and of the goals that are being pursued by the planned concentration;
- the turnover, balance sheet totals or gross premium income of the undertakings (see question 7) and the amounts apportioned to Switzerland;
- information on the relevant product and geographic markets that are affected by the concentration, such as regarding the market shares of the undertakings, a description of these markets (distribution and demand structures, importance of research and development), undertakings that have newly entered the market in the preceding five years and how might enter these markets within the next three years:

- The product market comprises all those goods or services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other hand with regard to their characteristics and intended use;
- The geographic market comprises the area in which on the one hand consumers purchase and on the other hand suppliers sell the goods or services that constitute the product market.

Notifications have to be made in one of the official languages, i.e. in French, German, Italian or Romansh. The procedure will then be conducted in that language, unless otherwise agreed.

Prior to the notification, the Parties and the Secretariat of the ComCo may mutually agree on the details of the content of the notification. The Secretariat may waive the obligation to submit particular information or documents if it considers that they are not necessary for the examination of the case (simplified notification).

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

The notification shall be accompanied by the following documents:

- copies of the most recent annual accounts and annual reports of the undertakings concerned;
- copies of the agreements that effect the concentration or that are otherwise connected with it;
- in the case of a public offer, copies of the offer documentation;
- 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.

Accompanying documents may be filed in English.

25. **Is there a filing fee?**

For the preliminary examination (phase I, initial review), the Secretariat will basically charge a flat-rate fee of 5'000.- Swiss francs instead of a "pro rata temporis" fee.

For the extended review (phase II), the costs are calculated on a "pro rata temporis" basis, with an hourly rate of 100.- to 400.- Swiss francs. The hourly rate depends on the urgency of the case and the function level of the staff involved.

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

There is no direct public announcement that a notification has been filed, but the decision of the ComCo to open an investigation proceeding after the first phase is published in the Federal Gazette as well as in the Swiss Official Gazette of Commerce (SOGC). This publication contains name, domicile and business activities of the undertakings concerned and a brief description of the concentration.

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

The ComCo may require information from interested third parties which may be relevant for the assessment of the proposed concentration. In this context, the third parties may be informed of the proposed merger while maintaining the business secrets of the participating companies. Affected third parties are obliged to provide the ComCo with all information necessary for its clarifications and to submit the necessary documents.

In addition, third parties may also express their views on the proposed merger on a voluntary basis. For this purpose, the ComCo announces, on the occasion of the publication of the decision to carry out an extended examination, a time limit within which third parties may submit written comments on the notified concentration.

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

With regard to the publication of the decision of the ComCo to open an investigation proceeding, see question 26.

The publication of the final decision of the ComCo contains the name and domicile of the undertakings concerned, a brief description of the planned concentration, a summary account of the grounds for the decision and the decision itself and is published in the Federal Gazette and the Swiss Official Trade Journal.

In principle, third parties can get access to all documents of the ComCo, including submissions of the parties. However, there are exceptions for business secrets and personal data. The former have to be described, while the latter have to be made anonymous. In case this is not possible, a decision has to be taken on a case-by-case basis. In this regard, the ComCo discloses information to third parties only in a restrained manner. Access to documents according to the Freedom of Information Act is granted only after an investigation has been closed by the authority.

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

The ComCo participates actively in various networks of competition authorities and is a member of the Competition Committee of the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN). These networks primarily serve the exchange of knowledge and experience.

The agreement between the Swiss Confederation and the European Union (EU) on cooperation in the application of its competition law should also be mentioned. The agreement offers the possibility of informing each other about enforcement measures, coordinating them and exchanging information. At the same time, it contains clear

rules on compliance with the existing procedural guarantees for the companies concerned.

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

The ComCo may allow mergers under conditions and obligations to be implemented either before or after the merger.

Conditions and obligations in the form of structural remedies may concern the sale of participations, companies, operations or rights, market openings as well as the unbundling of personnel, financial or contractual relationships.

Behavioural remedies which oblige companies to a certain market behaviour in the future are usually to be ordered subsidiary to structural measures as long as they appear appropriate in specific individual cases.

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

Remedies are ordered unilaterally by the ComCo either during phase 1 - if this can ensure effective competition and avoid an investigation procedure - or during phase 2. Thus, no formal consensus is required between the ComCo and the parties involved. However, the parties may try at any time during the merger control proceeding to negotiate the remedies with the ComCo, with particular regard to the way in which those should be implemented.

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

The penalties for an undertaking that implements a notifiable concentration without

filing a notification, fails to comply with a temporary prohibition on its execution, violates a condition imposed with the approval or implements a prohibited concentration can amount to up to one million Swiss francs.

If an undertaking repeatedly violates a condition imposed with the approval, a penalty of up to 10 percent of the total turnover in Switzerland achieved by all the undertakings concerned may be imposed.

In addition to undertakings, a natural person who implements a concentration subject to notification without notification or violates dispositions in connection with concentrations can also be fined up to 20'000.- Swiss francs.

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

If an undertaking fails to comply with an obligation to provide information or to present documents or fails to do so correctly, it will be fined an amount of up to 100'000.- Swiss francs.

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

The ComCo's decision not to allow a merger may be appealed to the Federal Administrative Court within 30 days. Its judgment may then be referred to the Federal Supreme Court.

In addition, the participating undertakings can apply to the Federal Department of Economic Affairs, Education and Research (Eidgenössisches Departement für Wirtschaft, Bildung und Forschung) within 30 days for exceptional approval by the Federal Council if there are overriding public interests.

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

The barriers to prohibit mergers in Switzerland are high. The turnover thresholds that trigger mandatory notification are already set very high and if a planned merger reaches the turnover thresholds and is examined in an extended investigation (phase II) the creation or strengthening of a dominant position on its own is not sufficient to block the merger; it must also be liable to eliminate effective competition (qualified market dominance, see question 13). As a result, only very few mergers have been prohibited to date, such as the planned mergers between Ticketcorner, Tamedia and Starticket or between the telecommunications companies France Télécom SA (Orange) and Sunrise Communications AG; in the latter case, the merged entity would have created a collective dominant position in the mobile telephony market together with another non-participating company (Swisscom).

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

Since the barriers to intervention for the review of mergers are high in Switzerland, there is a debate about introducing the SIEC test, which is the dominant merger control test in the EU. In the SIEC test, "simple market dominance" is sufficient, according to which a merger leads to the creation or strengthening of a dominant position. In contrast, Swiss merger control today requires the existence of "qualified market dominance" in order to be able to prohibit a merger. This means, that it is necessary that not only market dominance exists, but that it is also suitable for eliminating effective competition.