PRACTICE GUIDES

# Swiss M&A

First Edition

Contributing Editors
Ueli Studer, Kelsang Tsün and Sophie Stählin

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# Swiss M&A

## Practice Guide

Contributing Editors
Ueli Studer, Kelsang Tsün and Sophie Stählin

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This article was first published in July 2020
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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK
Tel: +44 20 7234 0606
Fax: +44 20 7234 0808

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First published 2020
First edition

ISBN 978-1-83862-427-9

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

# Acknowledgements

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

BAKER MCKENZIE

BÄR & KARRER AG

FMP FUHRER MARBACH & PARTNERS

HOMBURGER AG

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# Merger Control

**Marcel Dietrich and Richard Stäuber**[1]

## Introduction

Swiss merger control law requires that certain transactions are notified and approved before they may be implemented. Such merger control proceedings may be lengthy, absorb a lot of resources of the parties, and they can potentially affect the structure of the transaction – or even its feasibility – if there are competition issues. It is thus important that the specifics of Swiss merger control are considered from the outset and throughout transaction planning and implementation. This chapter sets out the relevant legal framework and key elements of the Swiss merger control regime, focusing on practical issues arising in M&A transactions and recent developments of Swiss practice.

## Legislative framework and regulators

### Legislative framework

Swiss merger control is governed by 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).

In addition, the Swiss Competition Commission (ComCo) and its Secretariat (Secretariat) have adopted communications and guidelines on the application of the relevant merger control provisions.

Swiss merger control law is in many respects similar to, and partly designed upon the model of, EU merger control law. Therefore, when applying Swiss merger control law, ComCo tends to look also at the guidelines (in particular the Consolidated Jurisdictional Notice) and decisional practice (in particular regarding market definitions) of the European Commission.

1 Marcel Dietrich and Richard Stäuber are partners with Homburger AG.



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## Regulators

Swiss merger control law is enforced by ComCo and its Secretariat. ComCo is the decision-taking body and consists of 11–15 members (currently 12) who are elected by the Swiss Federal Council. The Secretariat conducts the investigations, prepares the decisions of ComCo and, together with one member of the presiding body of ComCo, issues the necessary procedural rulings. The Secretariat consists of four departments: construction; services; infrastructure; and product markets. Each department handles the merger control filings in its area of competence. A fifth department, resources, provides administrative and technical services within the Secretariat. The headcount of the Secretariat amounted to 68 employees (58.1 FTE) as at the end of 2018 (most recent annual report available).

A special regime exists for certain banking mergers. If the Swiss Financial Market Supervisory Authority (FINMA) considers a concentration of banks necessary for reasons related to creditor protection, it takes the place of ComCo, which it shall invite to submit an opinion.

## No general foreign investment control regime (yet)

There is no general foreign investment control regime in force in Switzerland. Special regimes apply to certain sectors that were formerly served by state monopolies and where the conduct of business requires prior authorisation, such as telecommunications, broadcasting and airline transport services. In addition, the acquisition of a real estate company (ie, a company whose purpose is to own real estate) may require a permit from the competent cantonal authority under the Federal Act on the Acquisition of Real Estate by Foreign Persons prior to acquisition.

This legislative framework may change. In March 2020, the Swiss parliament asked the Federal Council (Switzerland's executive body) to propose foreign investment control legislation, aimed in particular at protecting Swiss know-how, employment, public order and safety. The Federal Council is required to elaborate a proposal for such regime for further review in parliament within two years.

# Scope of merger control

## Concentrations

The Swiss merger control regime applies to concentrations, a legally defined term comprising two kinds of transactions:

- a merger of two or more previously independent undertakings; and
- 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.

Control is the ability to exercise decisive influence over the activities of the other undertaking by the acquisition of rights over shares or by any other means. Control may thus be acquired directly or indirectly, de jure or de facto. In particular, a buyer may acquire control even when only acquiring a minority interest in the target, thus potentially triggering a notification obligation. This may in particular apply if:

- the buyer is granted strategic veto rights, for example, regarding the business plan, budget or appointment of senior management of the target;
- the buyer is highly likely to achieve a majority at the shareholders' meeting, given the expected participation; or



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- the target is economically dependent on the buyer, for example, because of very important long-term supply agreements or credits.

The Swiss merger control regime also applies to joint ventures (acquisition of joint control). In such cases, an additional requirement for the qualification as a concentration applies in that the joint venture needs to perform all functions of an autonomous economic entity, a concept known as 'full functionality'. This requirement is met if the joint venture has a management dedicated to its day-to-day operations and sufficient resources including finance, staff and assets to conduct its business activities on a lasting basis.

## Applicable notification thresholds

A merger control notification obligation for a certain concentration exists only if the undertakings concerned exceed the relevant thresholds. Undertakings concerned are the merging entities (in case of a merger) or the controlled and controlling undertakings (in case of an acquisition of control), respectively. Hence, the seller is not an undertaking concerned, and its activities are thus not relevant for assessing the notification obligation. Swiss merger control relies primarily on a turnover test, supplemented with a notification obligation for dominant undertakings.

Under the turnover test, a concentration is notifiable if in the financial year preceding the concentration:

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

With respect to insurance companies, annual gross insurance premium income is used instead of turnover, and with respect to banks and other financial intermediaries gross income. The relevant turnover is calculated on a consolidated basis (ie, the entire turnover of all companies under common control is relevant, excluding intragroup sales). This may significantly enlarge the relevant turnover. By way of example, in case of acquisitions by PE companies, the cumulative turnover of all their controlled portfolio companies has to be considered for an assessment of the controlling undertaking's turnover. In terms of geographic allocation of turnover, the domicile of the customer is normally relevant (as the place where competition for the relevant customer has taken place). A number of corporate groups in practice use Swiss subsidiaries as mere billing addresses. For such cases, ComCo has clarified in a note that mere invoicing to addresses in Switzerland for supplies taking place outside of Switzerland does not make such turnover Swiss turnover, and such turnover is hence not considered for the question as to whether the Swiss turnover thresholds are exceeded.

In addition, a notification obligation is triggered, irrespective of the turnover, if one of the undertakings concerned has 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, an adjacent market or a market upstream or downstream thereof.

Meeting one of the above thresholds is both necessary and sufficient for triggering a notification obligation in Switzerland:

- It is necessary in that ComCo does not have the authority to review a planned concentration, or to impose any remedies, if the thresholds are not met. This applies also in case the



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substantive threshold for intervention (see 'Threshold for intervention: dominance plus') would be met.

- Meeting the thresholds is also sufficient for a notification obligation: There is no additional nexus of a concentration to Switzerland required to trigger a notification obligation. The fact that the thresholds are met in a certain case sufficiently indicates local effects, according to the Federal Supreme Court. As a consequence, the Swiss merger control regime in principle also applies to foreign-to-foreign transactions. An exception applies to certain foreign joint ventures: According to a note published by the Secretariat, the establishment of a joint venture in Switzerland is not notifiable if the joint venture does not have any activities in Switzerland and such activities are neither planned nor foreseeable.

## Standstill obligation

If a merger control notification obligation exists, the parties must refrain from implementing the concentration before it is cleared by ComCo. During the period between signing and closing of a concentration, it is therefore important for the parties involved to continue their operations as if there was no concentration.

Hence, the buyer must refrain from influencing the target's day-to-day business. While certain preparatory work for the concentration's implementation after closing is allowed, exchanges of information between the parties must be limited until closing based on two leading principles:

- Any information must only be exchanged among the parties if there is a 'need to know' for the receiving party in order to prepare implementation. This need to know might depend on the stage and duration of the implementation preparations. If the time between signing and closing is long, more detailed information is often only required at a later stage of the implementation preparations.
- If information is exchanged that is commercially sensitive, such information must only be exchanged in a clean team. The clean team can only contain individuals that are not working in the parties' day-to-day business. Further, it must be assured that the clean team members are bound by separate confidentiality undertakings to refrain from disclosing clean team information to non-clean team members. In addition, clean team information should be held separately from other information and access must be restricted.

Upon request, ComCo may exceptionally authorise implementation of the concentration prior to clearance. The parties need to show good cause for such implementation, for example, by showing that the concentration could otherwise not be implemented or that third parties may suffer significant harm. With respect to concentrations of banks that are deemed necessary for reasons of creditor protection, special rules apply. FINMA is competent to review such concentrations (see 'Regulators'), and it may permit implementation at any stage of the proceedings.

In the case of public takeover bids, the standstill obligation may conflict with public takeover rules, in particular as the latter may require the acquisition of shares prior to clearance. Swiss law does not provide specific rules to address these situations. It is recommended to raise the topic with ComCo early in the process, and to potentially request early implementation or to propose arrangements on voting rights.



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## Merger control proceedings

### Notification

To obtain clearance of a concentration subject to merger control review, the concentration needs to be notified to ComCo. In the case of a merger, the notification obligation is on both merging parties that have to designate at least one joint representative. In the case of an acquisition of control, the notification obligation is with the undertaking(s) that acquire the control (ie, the buyer), but neither the target nor the seller. Compared with merger control notifications in other jurisdictions, Swiss notifications are rather lengthy and detailed, requiring – depending on the competition sensitivity of the concentration – significant time and effort for the parties to prepare.

ComCo has published a form for the notification of concentrations that lists the information that the notifying undertaking(s) have to submit. In particular, these are the following:

- description of the business activities of the undertakings concerned;
- description of the planned concentration, including the goals that are pursued with it; and
- information on the relevant product as well on the geographic markets that are affected.

The following documents need to be provided to ComCo:

- most recent annual accounts and reports of the undertakings concerned;
- any agreement affecting or related to the concentration;
- offer documentation, in case of a public takeover; and
- reports, analyses and business plans made with regard to the concentration, to the extent they contain relevant information for the competitive assessment of the concentration.

A lot of work in practice goes into the description of affected markets. Markets are affected if two or more of the undertakings concerned jointly hold a market share of 20 per cent or more, or if one of the undertakings concerned holds a market share of 30 per cent or more. There is a large body of decisional practice of ComCo and the European Commission on market definition, covering many sectors and activities, that will be considered to determine the relevant markets. These definitions of product and geographic markets may not correspond to the business perspective as to what 'markets' they operate in (they often are very narrow), and the required data may not be readily available with the parties.

For affected markets detailed information is required, in particular in the following respects: market shares of the parties and their competitors in the past three years; market entries in the past five years, expected market entries as well as the estimated costs of market entry; structure of supply and demand; importance of research and development; R&D activities of the undertakings concerned; key innovations; the innovation cycles; and patents, know-how and other intellectual property rights.

Parties to M&A transactions should also bear in mind that the reports and analyses they draft to assess a potential transaction in advance may ultimately need to be provided to ComCo – and considered for the competitive assessment of the concentration.

The undertakings concerned and the Secretariat may mutually agree on the details of the content of the notification prior to the notification of the concentration, and limit the required data. In doing so, the Secretariat may grant an exemption from the duty to submit particular information or documents if it is of the opinion that such information is not required for the assessment of a certain concentration. In practice, this is relevant for foreign-to-foreign mergers that deploy limited effects in Switzerland. The notification may also refer to the notification to



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the European Commission (Form CO) if the concentration has already been notified there, in particular where markets are broader than national.

There is no deadline for the notification to be submitted. However, the review period for ComCo only starts upon submission of a complete notification, and, as mentioned ('Standstill obligation'), a concentration must not be consummated before it is cleared. A concentration may even be notified before the signing of a transaction. In this case, the parties need to be able to show a good-faith intention to conclude an agreement (eg, by way of a letter of intent or memorandum of understanding).

The notification form may be submitted to the ComCo in any official language of Switzerland (ie, German, French or Italian). Any exhibits may be submitted in English.

## Course of proceedings

It is customary and recommended to enter into pre-notification contacts with the Secretariat, in particular in complex concentrations. To this end, the parties submit a draft filing to the Secretariat for review. The Secretariat subsequently will comment upon completeness and indicate what information it requires in addition, if any.

Upon formal submission of the notification, a one-month review period for ComCo to assess the concentration begins (Phase I). If a certain concentration has in parallel to be notified to the European Commission, it is recommended to align these filings in time. Specifically, by submitting the Swiss filing a few days after the Form CO (where the Phase I review period is 25 working days), the parties allow ComCo to await the European Commission's decision before it issues its own decision.

The Secretariat needs to revert on completeness of the notification within 10 days. If the notification is considered incomplete (a finding that will be avoided by the above-mentioned pre-notification contacts), the review period has not started and it will only begin upon submission of the missing information.

Within the one-month period, ComCo is required to notify the undertakings concerned whether it intends to open an in-depth investigation. If no such notice is given, the concentration may be implemented and clearance is assumed. Rather than remaining silent, however, ComCo regularly provides a comfort letter to the parties stating that it considers the concentration as unobjectionable. ComCo cannot prohibit a transaction at the end of Phase I. As an alternative to clearing a concentration or opening an in-depth investigation, ComCo may exceptionally authorise a concentration at the end of Phase I subject to conditions or obligations; such conditions or obligations need, however, the parties' approval.

If there are indications that a concentration creates or strengthens a dominant position, ComCo may open an in-depth investigation (Phase II). The in-depth investigation needs to be completed within four months. This period may only be prolonged if ComCo is prevented from reaching a decision in time for reasons attributable to the undertakings (in particular, if they fail to provide requested information in time). In controversial cases, ComCo will summon a hearing towards the end of the Phase II review period where the parties can provide their assessment of the concentration and third parties are asked for their views directly to the ComCo. At the end of Phase II, the concentration is either cleared unconditionally, cleared subject to conditions or obligations, or prohibited.

During the entire review process (Phase I and Phase II), the Secretariat is in charge with investigating the concentration and the primary point of contact for the parties. The Secretariat



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may request further information from the parties at any time, and parties are obliged to provide the requested information. In Phase II proceedings, the Secretariat may issue extensive requests with short deadlines (of a few days) that will absorb considerable resources with the parties.

### Further actors: third parties, the general public and other competition authorities

When reviewing a concentration, the Secretariat may contact third parties, in particular customers and competitors, and request their assessment The Secretariat regularly does so in Phase II proceedings. Where remedies (conditions or obligations) are considered, the Secretariat may also obtain the assessment of such remedies by market participants. Any such third parties are not parties to the merger control proceedings. Hence, they have no access to the file.

The submission of a notification is not made public. A Phase I clearance will not be published immediately, but ComCo regularly publishes its reasoned decisions in a quarterly overview which will appear a few months after clearance. In case of in-depth investigation (Phase II), ComCo will both publish its opening of such in-depth investigation and the final decision. Again, the reasoned decision will be published at a later stage. For the publication of the reasoned decision, the undertakings concerned have the possibility to indicate business secrets and request redaction in the published version of the decision. If the undertakings concerned and ComCo do not reach an agreement on business secrets, ComCo issues an appealable order.

In the case of concentrations notifiable in several jurisdictions, ComCo may contact other competition authorities. ComCo is entitled to may share information with the European Commission, based on the agreement between the EU and Switzerland concerning cooperation on the application of their competition law. Such exchange is possible without approval by the parties, but they need to be notified in advance. There is no legal basis allowing ComCo to exchange information with other competition authorities. However, ComCo may request a waiver of confidentiality from the parties to be able to exchange information with such further competition authorities.

### Appeals

The undertakings concerned may appeal a conditional clearance or a prohibition decision to the Federal Administrative Court. Third parties, such as competitors or customers, are not entitled to appeal a decision. The Federal Administrative Court has full jurisdiction to review ComCo's decision in fact and in law, and it may confirm or revise the decision of the ComCo. An appeal to the Federal Administrative Court has to be made within 30 days as of formal notification of ComCo's decision to the parties. The duration of the proceedings before the Federal Administrative Court depends largely on the complexity of the appeal and the case, but usually amounts to significantly more than one year.

The judgment of the Federal Administrative Court can be appealed to the Federal Supreme Court. The Federal Supreme Court can normally review the judgment only with respect to its conformity with the law and is bound by the facts established by the Federal Administrative Court. It can deviate from these facts only in case they are manifestly incorrect or have been established in violation of legal provisions. Appeals to the Federal Supreme Court have to be filed within 30 days as of receipt of the formal notification of the judgment of the Federal Administrative Court. The proceedings before the Federal Supreme Court usually take more than one year; however, in principle the judgments of the Federal Supreme Court are issued faster than the Federal Administrative Court's.



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Overall, appeal proceedings may be very lengthy and provide only unsatisfactory relief for the parties in the fast-paced area of M&A. By way of example, an appeal against a prohibition decision of ComCo of May 2017 (*Ticketcorner/Starticket*) is still pending with the Federal Administrative Court in March 2020, after the question of standing to appeal has been litigated up to the Federal Supreme Court.

### Sanctions

Non-compliance with the Swiss merger control regime may lead to sanctions for the parties and potentially the individuals acting on their behalf. An infringement of the standstill obligation – by omitting a notification or implementing a concentration prior to clearance – may be sanctioned with a fine. The undertaking(s) obliged to file a notification – the merging undertakings or the undertaking acquiring control – may be fined with up to 1 million Swiss francs, and in repeated cases with up to 10 per cent of their overall Swiss turnover. In addition, responsible individuals may be fined with up to 20,000 Swiss francs. Fines have already been imposed on undertakings for failure to notify, including with regard to foreign-to-foreign transactions. These fines are made public. Further, if a notifiable concentration has been implemented without notification, the ComCo may investigate it ex officio and take the necessary steps to restore effective competition, such as imposing remedies, or even ordering the separation of any combined undertakings. Last, the civil law effects of a notifiable concentration that has not been notified are suspended, potentially endangering the buyer's effective control over the target.

Any undertaking that fails to comply with a condition or obligation attached to an authorisation, implements a prohibited concentration or fails to implement a measure intended to restore effective competition may be sanctioned with a fine of up to 1 million Swiss francs, and in repeated cases with up to 10 per cent of its overall Swiss turnover.

Any undertaking that does not, or does not fully fulfil its obligation to provide information or produce documents may be fined with up to 100,000 Swiss francs. If the undertakings have provided inaccurate information, ComCo may revoke an authorisation or decide to investigate a concentration.

## Substantive assessment of concentrations

### Threshold for intervention: dominance plus

ComCo may intervene with a concentration if:

- the concentration creates or strengthens a dominant position liable to eliminate effective competition; and
- the concentration does not strengthen competition in another market such that the harmful effects of the dominant position can be outweighed.

According to the case law of the Federal Supreme Court, the liability of an elimination of competition is a condition on its own, in addition to dominance. The Swiss substantive test is therefore sometimes termed dominance plus. Compared with other jurisdictions, the threshold for intervention is rather high.

When applying this test, ComCo may in particular intervene under the theories of harm of single-firm dominance and collective dominance. Single-firm dominance entails that the merged entity can behave on its own appreciably independent from other market participants. Single-firm dominance liable to eliminate competition is in practice effectively excluded in the



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case of market shares below 50 per cent, and even higher market shares regularly become an issue only if they exceed 70 per cent. Under the concept of collective dominance ComCo reviews whether the concentration gives rise to a market structure that would allow the merged entity to enter into collusive practices together with another undertaking. Such collective dominance regularly requires, among others, a certain symmetry in size and characteristics of the potentially collusive companies as well as market transparency.

Economic efficiencies are traditionally not taken into consideration by ComCo when reviewing a concentration. However, as mentioned above, the Swiss substantive test provides that economic efficiency gains in one market can outweigh the effects of the creation or the strengthening of a dominant position and therefore overall promote competition. This provision for long had limited practical relevance, but this may be about to change (see 'Increased role for the efficiency defence').

The focus of the Swiss substantive merger control assessment is on the effects of a concentration on competition. Therefore, ComCo principally does not consider issues other than the competition effects of the concentration, such as foreign investments, national security, industrial policy, employment effects or other public interests. There is one exception: if FINMA deems a concentration of banks necessary for reasons related to creditor protection, the interests of creditors may be given priority (as to the competence of FINMA, see 'Regulators').

If ComCo prohibits a concentration, the undertakings concerned may request the Swiss Federal Council to nevertheless authorise the concentration for reasons of public interest. The Federal Council may take into consideration competition-related as well as further aspects in its assessment. To date, two such requests have been made, but none has been granted.

The dominance plus test as currently applied is subject to legislative review, and the threshold for intervention by ComCo may be lowered in the future (see 'Potential lowering of the threshold for intervention').

## Remedies and prohibition

If the threshold for intervention is met, ComCo may authorise a concentration subject to conditions or obligations, or prohibit it. According to the principle of proportionality, a prohibition is excluded to the extent the competitive concerns can be addressed by conditions or obligations. Conditions have to be implemented prior to closing of the transaction, whereas obligations may be implemented thereafter. ComCo usually imposes remedies in the form of obligations, and has used conditions only exceptionally. Other than under, for instance, EU merger control law, ComCo may impose remedies on its own, even if they have not been proposed by the parties. In practice, the parties nevertheless are heavily involved in the design of potential remedies.

Neither the Cartel Act nor the Merger Control Ordinance specify the types of conditions or obligations that may be ordered by the ComCo. In practice, both structural and behavioural remedies have been implemented. Other than in particular the European Commission, ComCo does not have a strong preference for structural remedies, such as divestitures. ComCo has in several cases accepted behavioural remedies, such as an obligation not to integrate certain businesses. In addition, access remedies may be considered, for example, in the telecommunications sector where access to a network infrastructure could be ordered.

Given the high threshold for intervention under Swiss law, prohibitions and decisions subject to conditions or obligations are rather rare. Overall, only four concentrations have been prohibited by ComCo since the introduction of merger control in 1996, most recently in 2017 with



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regard to a proposed merger of the two largest ticketing companies in Switzerland (*Ticketcorner/Starticket*). There has not been a clearance subject to conditions or obligations recently.

### Ancillary restraints

Ancillary restraints, such as non-compete obligations for the seller, are considered by ComCo as part of merger control review only if they are directly related to and necessary for the concentration. For such assessment, ComCo considers the practice of the European Commission and in particular follows the criteria set out in the European Commission's Notice on Ancillary Restraints.

Other than under EU competition law, ancillary restraints are, however, not automatically covered by the clearance of a concentration by ComCo. Rather, a specific request in the notification is required. The undertakings concerned have to describe the ancillary restraints in detail and provide an assessment as to why they consider such restraints as directly related to and necessary for the concentration.

If an ancillary restraint is not considered directly related to and necessary for the concentration, it is subject to the general assessment under competition law (prohibition of anticompetitive agreements).

## Recent developments and trends

### Potential lowering of the threshold for intervention

As set out under 'Threshold for intervention: dominance plus', the current Swiss test for the substantive assessment of concentrations – dominance plus – is subject to legislative review. In February 2020, the Federal Council (Switzerland's executive body) announced that it will submit a proposal for an amendment of the Cartel Act in the autumn of 2020, introducing a new substantive merger control test, the significant impediment to effective competition test (SIEC test), as known from EU competition law.

The potential introduction of the SIEC test would lower the threshold for regulatory intervention. In particular, the new test would allow for an intervention in the case of 'non-collusive oligopolies', namely a situation where a concentration neither leads to single-firm nor collective dominance, but nevertheless strengthens a competitor to a degree that effective competition is materially limited. It is expected that the introduction of the SIEC test would generally make Swiss merger control proceedings more time-consuming and burdensome for the parties, in particular given an increased role for economic evidence, and lead to more regulatory intervention.

### Increased role for the efficiency defence

For the first time, in 2019 ComCo explicitly relied on considerations of economic efficiency. As provided for under the Cartel Act, a concentration leading to or strengthening a dominant position liable to eliminate effective competition can be cleared if the concentration strengthens competition in another market such that the harmful effects of the dominant position are outweighed. ComCo considered this case given in a recent concentration in the logistics sector (*Gateway Basel Nord*).

Three companies, the Swiss Federal Railways (SBB), Hupac and Contargo, planned a large terminal with gateway function for combined transport. Because of the layout, lower shunting costs and volume bundling, major efficiency gains are to be achieved. SBB, Hupac and Contargo are vertically integrated and have high market shares in the upstream and downstream markets.



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The investigation revealed the possibility of eliminating effective competition on the markets for certain cargo-handling services. With respect to the efficiency gains, ComCo considered that the large terminal will lead to considerable improvements in combined transport and significant savings of cost and time, mainly related to rail freight transport and operator services. ComCo concluded that the improvement of competitive conditions outweighed the disadvantages in the markets for cargo-handling services and therefore cleared the concentration unconditionally.

### Focus on coordinated effects

As mentioned under 'Threshold for intervention: dominance plus', the threshold for intervention by ComCo based on single-firm dominance is rather high: even with market shares of up to 70 per cent, an intervention is regularly not possible. An intervention in the case of lower market shares may be possible based on the theory of harm of collective dominance, where it is assumed that the merged entity may enter into collusive practices together with another company. Against this backdrop, the analysis of collective dominance plays a particularly important role in Swiss merger control practice, compared with other jurisdictions. A full analysis of these effects was recently conducted in a proposed merger in the telecommunications sector (*Sunrise/UPC*).

Sunrise, Switzerland's second-largest mobile network operator and third-largest provider of broadband internet in Switzerland, planned to acquire UPC, the largest cable network operator in Switzerland. ComCo's in-depth investigation showed indications for collective market dominance between the merged entity (Sunrise/UPC) on the one side and the Swiss telecommunications incumbent and largest market player (Swisscom) on the other. Collective dominance was considered in the market for broadband internet for end-customers in those areas where only two network infrastructures were available, that is, the coaxial cable of the merged entity and Swisscom's copper network (but no fibre to the home infrastructure). ComCo reached the conclusion that collective dominance was unlikely, in particular owing to a lack of symmetry between the technologies of the two companies, as well as the reasonable position that Sunrise would continue its expansion strategy and new technologies, such as 5G. For these reasons the concentration was cleared unconditionally. Nonetheless, the proposed concentration was aborted, as approval by Sunrise's shareholders was considered unlikely.



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# Appendix 1

## About the Authors

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Marcel Dietrich is the head of Homburger's Competition | Regulatory team. His practice focuses on Swiss and EU competition and antitrust law as well as on commercial public and administrative law and regulated markets. He has extensive and longstanding experience in all areas of competition law ranging from merger control to administrative and civil antitrust litigation.

He also advises on compliance matters and internal investigations. With regard to regulated markets, he specialises in energy, healthcare and pharma, media and telecommunication, infrastructure and transport, as well as in public procurement.

He is a member of various national and international competition law associations. He is the chairman of the Zurich Bar Association's committee on competition law. He regularly publishes and lectures on various subjects of competition law, commercial public and administrative law.

**Richard Stäuber**
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Richard Stäuber is a partner in Homburger's competition and regulatory practice, focusing on Swiss and EU competition and antitrust law.

Richard Stäuber has broad experience in representing businesses in all areas of competition law before authorities and courts, including cartel and abuse of dominance proceedings, national and international merger control procedures, dawn raids and leniency proceedings. Richard Stäuber further regularly advises clients on distribution arrangements, cooperation projects and licence agreements. His areas of expertise also include regulated markets, in particular the healthcare and telecommunications sectors, as well as administrative law.

With a background in both law and economics and an active member in Swiss and international professional associations, Richard Stäuber publishes and lectures in his areas of specialisation.


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