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Merger Control

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Law and Practice

Contributed by Homburger

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Homburger is one of the largest Swiss law firms, with more than 150 lawyers. The Competition Regulatory team advises domestic and international clients on Swiss and European competition law and regulatory matters and represents them before the Swiss Competition Commission, the EU Commission and other courts and administrative authorities. Furthermore, it advises its clients on administrative law and on questions relating to market regulation. It represents them before administrative authorities and courts, particularly in the areas of procurement law, energy, health and pharma, media and telecommunications, infrastructure and transport, international trade as well as administrative law.

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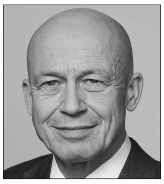

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

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, "MCO").

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

1.2 Legislation Relating to Particular Sectors

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

1.3 Enforcement Authorities

Swiss merger control law is enforced by the ComCo and the Secretariat. The ComCo consists of 11-15 members (currently 12), elected by the Federal Council, and is the decision-taking body. The Secretariat conducts investigations, prepares the decisions of the ComCo and, together with one member of the presiding body of ComCo, issues the necessary procedural rulings. The total headcount of the Secretariat amounted to 72 employees (60.9 full-time employees) as per the end of 2017. The Secretariat is split into four departments responsible for product markets, services, infrastructure and construction; a fifth department, resources and logistics, provides administrative and technical services within the Secretariat.

In the banking sector, the Swiss Financial Market Supervisory Authority ("FINMA") may intervene if it considers that the concentration risks impairing the interests of creditors. In such case, the FINMA takes the place of ComCo, which it shall invite to submit an opinion.

2. Jurisdiction

2.1 Notification

Notification is compulsory if the relevant turnover thresholds are exceeded or if an undertaking concerned has been held to be dominant in a relevant market in a final and binding decision (see **2.5 Jurisdictional Thresholds**, below). There are no exceptions to this regime.

2.2 Failure to Notify

If a notifiable concentration is implemented without prior notification, the undertaking that was obliged to notify may be fined with up to CHF1 million. In such case, the ComCo may investigate the concentration ex officio and impose any necessary remedies. In addition, the responsible individual person(s) may be fined with up to CHF20,000. There have been several cases where undertakings have been fined for failing to notify; these fines are made public. So far, no individuals have been fined. If a notifiable concentration is not notified, its legal effect is suspended (ie, the closing is null and void).

2.3 Types of Transactions

The following transactions constitute concentrations subject to merger control:

- 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.

2.4 Definition of 'Control'

Control is understood under Swiss merger control as the ability to exercise a decisive influence over the activities of another undertaking by the acquisition of rights over shares or by any other means. It is irrelevant whether control is acquired directly or indirectly, de jure or de facto. The means of obtaining control may in particular involve the acquisition of the following, either individually or in combination: (i) ownership rights or rights to use all or parts of the assets of an undertaking, (ii) rights or agreements which confer a decisive influence on the composition, deliberations or decisions of the organs of an undertaking.

The acquisition of minority or other interests that do not confer control are not notifiable in Switzerland. However, such acquisition may be reviewed as a potentially anticompetitive agreement. According to the ComCo, an acquisition may constitute an anticompetitive agreement if the parties intend to co-operate.

2.5 Jurisdictional Thresholds

Swiss merger control in the first instance applies a turnover test. A concentration is notifiable if two turnover thresholds are cumulatively met: in the financial year preceding the concentration, (i) the undertakings concerned together reported a turnover of at least CHF2 billion or a turnover of at least CHF500 million, and (ii) at least two of the undertakings concerned reported a turnover in Switzerland of at least CHF100 million. Compared to international standards, these turnover thresholds are relatively high. Undertakings concerned are, in case of a merger, the merging parties and, in case of an acquisition of control, the acquiring and the acquired undertaking (ie, excluding the seller).

In addition, notification of a concentration is mandatory – irrespective of the turnover achieved – if one of the undertakings concerned (acquirer and target, excluding the seller) 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. For this threshold to be applicable, dominance needs to be determined in the binding part of the decision – ie, the notification obligation is not triggered if an undertaking is only held to be dominant in the reasoning of a decision.

2.6 Calculations of Jurisdictional Thresholds

Turnover is calculated on a consolidated basis (excluding intra-group sales). Turnover is geographically allocated to the place where competition for the relevant customer has taken place, which normally is the domicile of the customer. If the parties to the concentration make no sales to customers in Switzerland, but merely the invoicing is carried out via billing addresses in Switzerland for transaction taking place outside of Switzerland, such turnover is not considered to be achieved in Switzerland.

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

Sales booked in a foreign currency shall be converted into Swiss francs in accordance with generally accepted accounting principles applicable in Switzerland. In practice, the average yearly exchange rates published by the Federal Tax Administration are regularly used to convert foreign currencies.

2.7 Relevant Businesses/Corporate Entities for the Purpose of Calculation

The turnover of an undertaking concerned comprises the turnover of the entire group – ie, the turnover of its subsidiaries, parent companies, sister companies and joint venture companies, but excluding intra-group sales. The seller's turnover need not be included with that of the target. The turnover of a joint venture that is jointly controlled by undertakings concerned shall be apportioned among those undertakings in equal parts (again, excluding any intra-group sales).

Changes in the business during the reference period are reflected similarly as under EU competition law. The turnover of a business divested in the financial year preceding the concentration must be fully subtracted, and the turnover of acquired businesses fully added.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control in Switzerland if the relevant thresholds are met. According to the Federal Supreme Court, the fact that the thresholds are met in a certain case sufficiently indicates local effects.

An exception applies to foreign joint ventures. The Secretariat has published a notice according to which it does not consider the establishment of a joint venture in Switzerland notifiable (even if the turnover thresholds are met by the joint venture's parent companies) if the joint venture does not have any activities in Switzerland and such activities are neither planned nor foreseeable.

2.9 Market Share Jurisdictional Threshold

Jurisdictional thresholds in Switzerland are in the first instance turnover-based. The additional notification obligation based on one party's confirmed dominance (see **2.5 Jurisdictional Thresholds**, above) requires that the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof. Therefore, confirmed dominance of one party is in itself not sufficient to trigger a notification obligation. Conversely, it is also not required that there is a substantive overlap in that market where one party is dominant for this threshold to be met, but it is sufficient that the transaction has a competitive relation to such market.

2.10 Joint Ventures

Three types of joint ventures are subject to merger control:

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

2.11 Power of Authorities to Investigate a Transaction

If the jurisdictional thresholds are not met, the ComCo does not have power to investigate a transaction or to impose any corrective measures if a transaction creates or strengthens a dominant position liable to eliminate effective competition.

2.12 Requirement for Clearance Before Closing

Implementation of a transaction must be suspended prior to clearance.

2.13 Penalties for Implementation of a Transaction Before Clearance

If a notifiable transaction is implemented before clearance, the undertakings concerned may be fined up to CHF1million. The responsible individual(s) may in addition be fined up to CHF20,000; these fines are made public. Fines have also been imposed in the case of foreign-to-foreign transactions.

2.14 Exceptions to the Suspensive Effect

The parties may request the ComCo to authorise implementation of the concentration prior to the review period. The parties need to show good cause for such implementation in that the concentration could otherwise not be implemented or that third parties may suffer significant harm if implementation was suspended during the review period.

Special rules apply to concentrations of banks that are deemed necessary for reasons of creditor protection. Such concentrations are reviewed by the Swiss Financial Market Supervisory Authority ("FINMA") which may allow implementation at any stage of the proceedings.

There are no specific rules for public takeover bids. The ComCo should be contacted in advance in case of such bids in order to allow for co-ordination of their proceedings with the proceedings of the competent takeover board. It is also possible to request authorisation prior to the expiry of the review period in such cases or to propose arrangements on voting rights (see below, **2.15 Circumstances Where Closing Before Clearance is Permitted**).

2.15 Circumstances Where Closing Before Clearance Is Permitted

To our knowledge, a carve-out of affected businesses or assets to allow for closing of a global transaction before receipt of clearance in Switzerland has so far not been accepted by ComCo. In particular in the case of takeover bids, the ComCo has in practice accepted arrangements on the limitation of voting rights during pending merger control proceedings.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There are no specific deadlines for notification. Notification must be submitted prior to the implementation of the concentration, and the concentration must not be implemented prior to clearance (or grant of a derogation from the suspensive effect). Implementation without notification (see **2.2 Failure to Notify**, above) or during pending proceedings (see **2.13 Penalties For Implementation of a Transaction Before Clearance**, above) may result in a fine of up to CHF1 million. In addition, the responsible individual(s) may be fined up to CHF20,000.

3.2 Type of Agreement Required

In principle, a concentration can only be notified once the parties have reached a binding agreement. In practice, the ComCo accepts notifications already at an earlier stage when the parties can document a good faith intent to reach a binding agreement, as expressed in particular in a letter of intention or memorandum of understanding ("MOU"). We are not aware of cases where a notification has been accepted at a stage where such good faith intention could not be documented in writing.

3.3 Filing Fees

For the Phase I review period a filing fee of CHF5,000 is charged. The notifying undertaking is usually asked for payment after expiry of the review period. For a Phase II investigation, the fees are charged based on the time spent by the ComCo and the Secretariat. Hourly rates range from CHF100 to CHF400, depending on the urgency of the matter and the seniority of the respective individuals.

3.4 Parties Responsible for Filing

In case of a merger, both merging parties need to jointly submit the notification. In case of an acquisition of control, the notification obligation is upon the undertaking(s) acquiring control. If a joint notification is made, the notifying companies have to designate at least one joint representative.

3.5 Information Required in a Filing

The ComCo has published a form for the notification of concentrations. Essentially, the notifying undertaking(s) are required to submit the following information:

- name, domicile and a brief description of the business activities of the undertakings concerned;
- description of the planned concentration, including the goals that are pursued with it;
- turnover, gross premiums or gross income (as the case may be) of the undertakings concerned, both for Switzerland and worldwide;
- information on the relevant product and geographic markets affected, including market shares of the undertakings concerned and principal competitors for the preceding three years;
- information regarding market entries in the last five years and excepted market entries as well as the market entry costs.

In addition, copies of the following documents needs to be provided:

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

The notification form may be submitted in any official Swiss language (ie, German, French or Italian); accompanying documents may be submitted in English.

There are no requirements for formalisation of submitted documents, such as certification, notarisation or apostillation.

3.6 Penalties/Consequences if Notification Is Deemed Incomplete

There are no penalties for incomplete notifications. The review period will, however, only commence once the notification is complete. Within ten days as of submission of the notification, the Secretariat confirms its completeness, or requests additional information.

3.7 Penalties/Consequences if Notifying Party Supplies Inaccurate or Misleading Information

An undertaking submitting incorrect or misleading information may be fined up to CHF100,000.

3.8 Phases of the Review Process

The ComCo is required to notify the undertakings concerned within one month from receipt of the complete notification whether it intends to open an investigation (Phase I). If no such notice is given within that time period, the transaction may be implemented. Regularly, the ComCo provides the companies in such case with a "comfort letter" that it regards the concentration as unobjectionable.

If the ComCo decides to open an investigation, it must be completed within four months, unless the ComCo is prevented from doing so for reasons attributable to the undertakings concerned (Phase II).

3.9 Parties Engaging in Pre-Notification Discussions with the Authorities

The parties can and typically do engage in pre-notification with the Secretariat. The parties submit a draft filing that the Secretariat will review and comment upon with regard to information missing which will need to be provided for the notification to be considered complete. In complex transactions, pre-notification is generally welcomed by the Secretariat and highly recommended.

3.10 Requests for Information During the Review Process

The Secretariat regularly requests information during the review process. If the request pertains to information that the Secretariat considers required for completion of the notification, the review period only starts once such information has been submitted. The Secretariat may also request additional information that is not required for completion of the notification. The parties are obliged to provide such information within the deadline set by the Secretariat, but the request does not suspend the review period.

3.11 Accelerated Procedure

Prior to the notification of a concentration, the undertakings concerned and the Secretariat may mutually agree on the details of the content of the notification. The Secretariat may grant exemptions from the obligation to submit particular information or documents. In practice, this is particularly relevant for foreign-to-foreign mergers with limited effects on the Swiss market.

4. Substance of the Review

4.1 Substantive Test

The substantive test is based on a dominance test supplemented by an additional test on the remaining degree of competition. According to this "dominance-plus test", a concentration may only be prohibited, if:

- the transaction creates or strengthens a dominant position;
- that dominant position is liable to eliminate effective competition in the relevant market; and
- the transaction does not strengthen competition in another market outweighing the negative effects of the dominant position.

Compared to other jurisdictions, this threshold is comparatively high. In view of this high threshold, in the last 22 years (since the current merger control system was introduced), only four mergers have been prohibited by the ComCo:

- Berner Zeitung/Thuner Tagblatt (1998 – notification withdrawn prior to formal prohibition);
- Berner Zeitung/20 Minuten (2004 – subsequently cleared upon appeal subject to obligations);
- France Télécom/Sunrise Communications (2012); and
- Ticketcorner/Starticket (2017).

It is currently contemplated to replace this "dominance-plus test" by the SIEC test ("significant impediment to effective competition") as applied in the EU. A proposal for an amendment of the relevant provision of the Cartel Act is expected to be published in the course of 2018.

4.2 Markets Affected by a Transaction

Markets are considered affected by the transaction if either two or more of the undertakings concerned jointly hold a market share of 20% or more in Switzerland, or if one of the undertakings concerned holds a market share of 30% or more in Switzerland.

4.3 Reliance on Case Law

The ComCo regularly considers the practice of the European Commission, in particular with regard to market definitions. Furthermore, the case law in neighbouring countries of Switzerland will also be considered, namely the practice of the German Federal Cartel Office.

4.4 Competition Concerns

As mentioned above in **4.1 Substantive Test**, the current substantive test in Switzerland is a "dominance-plus test". Applying this test, the ComCo investigates unilateral effects, co-ordinated effects in case of oligopolies, conglomerate effects as well as vertical concerns and the elimination of potential competition.

4.5 Economic Efficiencies

Generally, the ComCo does not consider economic efficiencies as a mitigating factor. However, efficiencies may be taken into account if they are likely to prevent the elimination of effective competition. In addition, economic efficiency gains in one market may outweigh the effects of the creation or strengthening of a dominant position in another market (see above, **4.1 Substantive Test**).

4.6 Non-Competition Issues

The ComCo does not consider non-competition issues, such as industrial policy, national security, foreign investment, employment or other public interest issues in its review of planned concentrations. As an exception to that principle, the Cartel Act provides that in a concentration of banks that is deemed necessary by the Swiss Financial Market Supervisory Authority for reasons related to creditor protection, the interests of creditors may be given priority (Article 10(3) Cartel Act). In such a case, the Financial Market Supervisory Authority takes the place of the ComCo.

Further, in case of a prohibition of a concentration by the ComCo, the undertakings concerned may request the Federal Council of Switzerland to authorise the concentration for reasons of public interest. In such a case, the Federal Council may take into account both competition-related and non-competition-related considerations in its assessment of the concentration. However, up to now, no such authorisation has been granted.

4.7 Special Consideration for Joint Ventures

No specific rules are applicable to joint ventures, but they are also assessed under the “dominance-plus test” (see above, **4.1 Substantive Test**).

5. Decision: Prohibitions and Remedies

5.1 Authorities’ Ability to Prohibit or Interfere with a Transaction

The ComCo may prohibit or interfere with a transaction only if the conditions of the “dominance-plus test” (see above **4.1 Substantive Test**) are met. If the companies do not comply with a prohibition decision, the ComCo may take all necessary steps to restore effective competition. In particular, the ComCo may order the separation of any combined undertakings or the cessation of the controlling influence. In addition, the ComCo may sanction companies that do not comply with a prohibition decision with a fine of up to CHF1 million.

5.2 Parties’ Ability to Negotiate Remedies

A concentration may be cleared subject to certain conditions or obligations. The law does not specify the types of conditions or obligations that may be ordered, or set a standard that remedies must meet to be deemed acceptable. In practice, both divestitures and certain behavioural remedies have been implemented, and the scope of these remedies will be discussed by the parties with the ComCo.

In case of international transactions, it is particularly important to co-ordinate the remedies offered with those offered to other competition authorities, in particular the European Commission.

5.3 Legal Standard

The remedy must be necessary and appropriate to preserve effective competition. Based on the general principle of proportionality, the ComCo must choose the remedy that least interferes with the companies’ economic freedom.

5.4 Typical Remedies

Both behavioural and structural remedies have been used in practice, and their choice depends on the characteristics of the affected markets and the identified competition concerns. While the ComCo prefers structural undertakings (ie, divestitures), it has shown to be more open to behavioural remedies than the European Commission. Remedies ordered by the ComCo can only take into account competition issues.

5.5 Negotiating Remedies with the Authorities

Other than in EU merger control proceedings, there are no procedural provisions under Swiss law as regards remedies, such as the timing of their negotiations. The most appropriate moment to commence remedy negotiations has to be determined in the individual case.

5.6 Conditions and Timing for Divestitures

Swiss law distinguishes between conditions and obligations. Conditions need to implemented before the concentration is completed, whereas obligations need to be implemented thereafter. In the latter case, according to the practice of ComCo, the remedy must be implemented within a specified period – ie, it is not sufficient for the parties to commit to divest certain assets “as early as possible”.

If remedies are not fully complied with, the ComCo may impose sanctions of up to CHF1 million or, in case of repeated non-compliance, an amount of up to 10% of the overall turnover of the undertakings concerned in Switzerland.

5.7 The Decision

At the end of Phase I proceedings (preliminary investigation), the ComCo may issue an order to clear the transaction if conditions and obligations are imposed. Without remedies, the ComCo regularly does not issue a formal order at the end of Phase I, but provides the parties with a comfort letter clearing the transaction. The ComCo cannot prohibit the transaction at the end of a Phase I.

At the end of Phase II proceedings (in-depth investigation), a formal decision is ordered clearing (potentially subject to conditions and/or obligations) or prohibiting the concentration.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In 2017, the ComCo issued a prohibition decision (one of only four prohibitions since 1996) regarding the proposed concentration of Ticketcorner and Starticket. There has not been a clearance subject to conditions and/or obligations recently.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The ComCo only considers ancillary restraints to the extent they are directly related to and necessary for the concentration. Whether these conditions are given is assessed according to criteria that are comparable to the criteria applicable under EU competition law, as set out in the European Commission's Notice on Ancillary Restraints.

However, ancillary restraints that qualify under these criteria are not automatically covered by the clearance of the transaction, but only upon specific request. The ComCo expects the notifying undertaking(s) to specifically describe the ancillary restraints and provide an assessment in the notification as to why they qualify as directly related and necessary to the concentration.

7. Third Party Rights, Confidentiality and Cross-Border Cooperation

7.1 Third Party Rights

The Secretariat regularly sends out questionnaires to third parties, in particular customers and competitors, to solicit their opinion on a planned concentration and to obtain a better understanding of the market conditions and the competitive environment. These third parties do not have any formal procedural rights. The ComCo is neither obliged to send out questionnaires nor to consider the replies received.

7.2 Contacting Third Parties

As part of its review process, the Secretariat regularly contacts third parties by sending out questionnaires. In case remedies are offered, the Secretariat is likely to obtain the assessment of such remedies by market participants ("market testing").

7.3 Confidentiality

The fact of the submission of a notification is not made public. Conversely, the decision to open an investigation proceeding (Phase II) and the final decision of the ComCo authorising or prohibiting a concentration are published in the Official Federal Journal.

The undertakings concerned may specify what information they consider as business secrets and ask the ComCo to keep such information confidential. In the event of a difference of opinion on whether certain information constitutes a business secret, the ComCo will issue an appealable order.

7.4 Cooperation with Other Jurisdictions

The agreement between the EU and Switzerland concerning the co-operation on the application of their competition law provides a framework for the co-operation between the ComCo and the European Commission. By virtue of this agreement, information may under limited circumstances be shared with the other authority without consent of the undertakings concerned (second generation agreement). In such case, the ComCo has to notify the undertaking concerned and invite it to state its views before transmitting the data to the European Commission.

With regard to other authorities, such exchange of information is only possible with the consent of the parties. Typically, the ComCo will then request a so-called waiver letter from the undertakings concerned.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Decisions of the ComCo in merger control cases are subject to an appeal to the Federal Administrative Court. The Federal Administrative Court has full jurisdiction to review the ComCo's findings of fact, legal assessment and sanctions/penalties, under all aspects of fact and law.

The judgment of the Federal Administrative Court may be appealed to the Federal Supreme Court. The Federal Supreme Court can review the judgment only with respect to its conformity with the law. It is bound by the facts that have been established before the Federal Administrative Court, unless they are manifestly incorrect or have been determined in violation of legal provisions.

8.2 Typical Timeline for an Appeal

An appeal to the Federal Administrative Court needs to be filed within 30 days of formal notification of the ComCo's decision. The duration of the appeals proceedings vary, but regularly amount to significantly more than a year.

An appeal to the Federal Supreme Court needs to be filed within 30 days as of receipt of the formal notification of the judgment of the Federal Administrative Court. The duration of the proceedings regularly amounts to a year or more.

8.3 Third Parties Appealing a Clearance Decision

Third parties cannot appeal a clearance decision.

9. Recent Developments

9.1 Recent Changes or Impending Legislation

The Swiss government is currently considering whether the substantive test for assessing mergers should be changed from the "dominance-plus test" currently in force to the SIEC test, as applied in the EU. It is expected that the Swiss government will submit such a proposal for consideration by the Swiss parliament in the course of 2018.

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9.2 Recent Enforcement Record

In 2017, the ComCo issued its fourth prohibition decision in the 22-year history of merger control in Switzerland by prohibiting the proposed merger between Ticketcorner and Starticket, two Swiss ticketing companies that are controlled by Tamedia and Ringier, two Swiss media groups. The companies are active in the market for distribution of tickets for events, such as concerts and shows, through physical and online channels (primary ticketing). The ComCo concluded that the proposed merger would eliminate effective competition in primary ticketing, and strengthen the market position of the two ticket companies. For lack of feasible remedies, the concentration was prohibited.

9.3 Current Competition Concerns

There is no specific focus of the ComCo's enforcement policy in merger cases.