Competition Law

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1. Agreements restricting competition

1.1 Introduction

The Swiss *Act on Cartels* ("CA") *(Kartellgesetz; Loi sur les cartels)* distinguishes three types of agreements restricting competition:

- Agreements that only insignificantly restrict competition. Such agreements are lawful.
- Agreements that significantly restrict competition. Such agreements are unlawful unless it can be shown that they are justified for reasons of economic efficiency (see below *1.2*).
- Agreements that eliminate effective competition. Such agreements are unlawful and cannot be justified for reasons of economic efficiency. The CA presumes that certain restrictions, i.e. horizontal price fixing, quota cartels and market sharing (horizontal hard-core restrictions) as well as vertical price fixing and territorial protection eliminate effective competition (see below *1.3*).

Unlawful agreements restricting competition have no effects between the parties and are void. In addition, direct fines may be imposed on parties that entered into agreements that presumptively eliminate effective competition (i.e. horizontal hard-core restrictions as well as vertical price fixing and vertical territorial protection) (see below *1.4*).

1.2 Agreements significantly restricting competition

As regards agreements that significantly restrict competition, such practices are unlawful if the following conditions are cumulatively fulfilled:

- agreement or concerted practice
- which has as its object or effect the restriction of competition
- which is significant and
- which cannot be justified on grounds of economic efficiency

1.2.1 Agreement or concerted practice

The CA does not only cover binding and non-binding **agreements** but also **concerted practices.** Concerted practices are a form of co-ordination which, without qualifying as an agreement, knowingly substitutes co-operation between the respective enterprises for competition. **Recommendations** (for example price recommendations issued by trade associations) are considered as concerted practice where the majority of the addressees follow them.

However, mere **parallel behavior**, where enterprises react in the same way but based on autonomous decisions to changes in the market, is not caught by the concept of concerted practice. This applies even if such parallel behavior occurs consciously, i.e., if the enterprises know that their competitors will react to market changes in a parallel way. This is because competition also implies that competitors monitor each other and the market conditions and must have the possibility to react to such changes in a profit-maximizing manner. The same is true for price leadership where competitors, based on autonomous decisions, follow the pricing behavior of the market leader.

In the following, the term "agreement" is used as a collective term for both agreements and concerted practices.

1.2.2 Object or effect of restricting competition

Only agreements and concerted practices having as their object or effect a restriction of competition may be unlawful. As regards horizontal or vertical agreements on prices, territorial protection and production quota, such agreements are frequently considered to have as their object or effect a restriction of competition.

1.2.3 Significant restriction of competition

The Competition Commission has chosen different approaches regarding the question whether horizontal and vertical agreements constitute significant restrictions of competition.

As regards **horizontal agreements**, the Competition Commission examines whether they are **qualitatively and quantitatively** significant. A restriction is qualitatively significant if it restricts important competition parameters. This is often deemed to be the case if the restriction concerns parameters such as prices, quantities and the territory or customers. Quantitative significance may be negated where the enterprises participating in the practice have less than 30%–50% cumulative market share or where the enterprises do not observe the agreement.

As regards **vertical agreements**, the Competition Commission has taken a tougher approach. In its notice on the assessment of vertical agreements under the CA "Vertical Restraints Notice")[1], the Competition Commission states that the following vertical restrictions are deemed to be significant **regardless of the market share** of the parties involved:

- restrictions on the dealer's ability to determine its sale price
- restriction of the territory into which or of the customers to whom the dealer may sell
- restriction of sales to end users by dealers in a selective distribution system
- restriction of cross-supplies between dealers in a selective distribution system
- restrictions that limit a supplier to sell components and spare parts to third parties
- non-compete obligations of a duration of more than five years or more than one year after the termination of the vertical agreement[2]

Vertical restrictions not falling within one of the above categories are significant if one of the parties has a market share of 10% in the affected market or if the parallelism of several similar distribution networks restricts competition.

1.2.4 Justification on grounds of economic efficiency

Significant restrictions of competition are only lawful if they can be justified on grounds of economic efficiency. This is the case if the restriction:

- is necessary to reduce production or distribution costs; to improve products or manufacturing processes; to promote research or the dissemination of technological or professional know-how; or to rationalize the use of resources; **and**
- under no circumstances allows the participating enterprises to eliminate effective competition

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1 See http://www.weko.admin.ch/publikationen/00213/index.html?lang=en

2 See also decision of 6.12.2004, Feldschlösschen Getränke Holding / Coca Cola AG / Coca Cola Beverages AG, para. 108–110.

So far, the Competition Commission has interpreted this efficiency justification very narrow. Thus, many practices which where found to form a significant restriction of competition were also found not to be justifiable and consequently to be unlawful. Also in many cases, the Competition Commission argued that the justification offered by the parties did not constitute an efficiency justification within the sense of the CA, rather it would constitute a general public interest not to be assessed by the Competition Commission. In other cases the Commission argued that the restriction would not be necessary to achieve the efficiency goal. Broadly speaking, these cases involved *inter alia* restrictions regarding prices, territories and refusals to deal. For example, in a case where producers and wholesalers of veterinary drugs did only supply the veterinarians but not pharmacies, the Competition Commission did not accept the parties' justification that the pharmacies did not have the know-how to distribute the veterinary drugs. It basically argued that this did not constitute an efficiency justification and should not be the suppliers' and wholesalers' concern but the one of the pharmacies.[3]

One of the rare cases where the Competition Commission held that a significant restriction of competition was justified by reasons of economic efficiency, involved a specialization agreement between small and medium enterprises in the print industry.[4]

1.2.5 Notices of the Competition Commission

The Competition Commission has issued various notices in which it has stated under which conditions specific restrictions can or cannot be justified for reasons of economic efficiency:

As regards **vertical agreements**, the Competition Commission has stated in its **Vertical Restraints Notice** that the following restrictions of the territory or the customers to which a distributor may sell contract goods are justified by reasons of economic efficiency:

- the restriction of active sales only
- the restriction of sales to end users by a distributor operating at the wholesale level of trade
- the restriction of sales to unauthorized distributors by the members of a selective distribution system
- the restriction of the distributor's ability to sell components, supplied for the purpose of incorporating them into products, to customers who would use them to manufacture goods competing with goods of the supplier

Unfortunately, the Vertical Restraints Notice does not elaborate under which conditions other restrictions than the above may be justified. However, as a general rule, it can be assumed that restrictions that would be block-exempted under the block exemption regulation EC No. 2790/1999 are also justified under the CA.

In its notice on the assessment of vertical restraints in the **motor vehicle sector**[5], the Competition Commission lists certain restrictions that cannot be justified regardless of the market share of the parties involved. This catalogue intends to mirror more or less the block exemption regulation EC No. 1400/2002[6] of the European Commission. Without going into details, for example, similar to

3 RPW 2004/4, 1073ff. para. 106ff., Vertrieb von Tierarzneimitteln.

4 RPW 1998/1, 26ff. para. 37ff., Virtuelle Kalenderfabrik Schweiz (VKFS).

5 See http://www.weko.admin.ch/publikationen/00213/index.html?lang=en

6 See http://europa.eu.int/comm/competition/car_sector/

regulation EC No. 1400/2002, a supplier may choose between an exclusive and a selective distribution system but must not combine them; dealers cannot be restricted in their freedom to determine prices, dealers must have the possibility to establish multibrand outlets, dealers may choose only to service cars without selling them, and there are far-reaching obligations to supply independent repairers. However, due to its inexact wording, this notice leaves many questions open and unanswered.

In its notice on agreements on the use of **guidelines on cost calculation**[7], the Competition Commission has set out the conditions under which guidelines on cost calculation are justified on grounds of economic efficiency. Put briefly, agreements regarding the use of guidelines on cost calculation are justified where such guidelines do only describe methods of cost calculation and do not restrict the freedom of the parties to determine their own prices and conditions of sale and do not imply an information exchange which could lead to a concerted practice. Consequently, guidelines on cost calculation cannot be justified if they stipulate fixed amounts of costs or if they suggest specific prices, margins or rebates.

Another notice concerns the **homologation and sponsoring of sport goods**[8]. In short, agreements on the **homologation** of sport goods are lawful if they are based on non-discriminatory and objective criteria which are contingent on the technical and qualitative requirements linked to the intended use of the respective sport goods. In addition, an international homologation must be acknowledged if the sport good fulfills the respective criteria. Agreements which make the use of sport goods conditional upon **sponsoring** are unlawful if they provide for an exclusive use of the sport goods of a sponsor and if such exclusivity applies to an entire tournament or sport event with a duration of a year, a season or a large part of it.

1.3. Agreements presumptively eliminating competition

1.3.1 Horizontal agreements

As already mentioned, the CA provides for that the following **horizontal agreements** (i.e. agreements between actual or potential competitors) are presumed to eliminate effective competition:

- agreements to directly or indirectly fix prices. The main examples for such agreements are "classic" price cartels or bid rigging.
- Agreements to restrict the quantities of goods or services to be produced, bought or supplied. The main examples are quota cartels which serve to stabilize price cartels. However, according to the Competition Commission, also mutual specialization agreements are caught by this category (which practice goes clearly too far).
- Agreements to allocate markets by territories or by customers.

The **presumption** that effective competition is eliminated can be **rebutted** by showing that there is either effective external or effective internal competition.

7 RPW 1998/2, 351ff.; no official English version is available; for a German version see http://www.weko.admin.ch/publikationen/00213/index.html?lang=de&PHPSESSID=a277b7044b8305db74c0a732dd65f39c

8 RPW 1998/1, 154ff.; unfortunately, no official English version is available; for a German version see http://www.weko.admin.ch/publikationen/00213/index.html?lang=de&PHPSESSID=a277b7044b8305db74c0a732dd65f39c

Effective **external competition** exists where "outsiders" (rivals not being parties to the agreement) create enough competitive pressure. This has been negated where the parties to the agreement had a combined market share of 90%. In some cases, however, the Competition Commission found competition that the parties to the agreement had a combined market share as high as 45%–77%.

Effective **internal competition** exists where the parties to the agreement do not comply with the agreement or where other competition parameters than the one restricted by the agreement are creating sufficient competition. For example, in the case of the book resale price maintenance, the Swiss Supreme Court held that other competition factors, such as a clearly arranged display, helpful advise and a full range of books were of more importance than the price and, therefore, found that the internal competition among the book stores was still effective.

If the presumption cannot be rebutted, the agreement is unlawful and therefore void. If the presumption can be rebutted, it has to be assessed whether the respective agreement significantly restricts competition and, if this is the case, whether the agreement can be justified for reasons of economic efficiency.

1.3.2 Vertical agreements

As regards vertical agreements, i.e. agreements between firms being active on different levels of trade, elimination of effective competition is presumed in the following two cases:

- agreements fixing minimum prices. The presumption does not cover vertical agreements on maximum prices. The same is true for resale price recommendations of a single supplier as long as there is no pressure or incentive offered to follow the recommended prices.
- Distribution agreements prohibiting passive sales (i.e. unsolicited sales). The presumption does not cover the prohibition of active sales. Also it does not cover territorial protections in license agreements.

There is no case law specifying under which conditions the **presumption** of elimination of effective competition can be **rebutted**. Several members of the Competition Commission are of the view that the degree of interbrand-competition (i.e. competition resulting from other suppliers) is irrelevant and that the presumption may only be rebutted by showing that distributors do not comply with the respective agreement. However, this view is hardly defensible since it would treat horizontal hard-core cartels more leniently than vertical restrictions.

If the presumption is rebutted, again, it has to be examined whether the agreement significantly restricts competition and, if this is the case, whether the agreement can be justified for reasons of economic efficiency.

1.4 Consequences of unlawful agreements

There are civil and public law consequences of unlawful agreements restricting competition.

As regards civil law, unlawful agreements restricting competition are void and not enforceable.

With respect to public law, the Competition Commission can impose so-called **direct fines** in case of unlawful agreements that are presumed to eliminate effective competition. As set out above in 1.3, these are (1) horizontal agreements on price fixing, quota and market sharing as well as (2) vertical agreements on price fixing and territorial protection. As regards unlawful practices not falling within the scope of these two categories, fines can only be imposed after the parties have either contravened a decision declaring the practice as unlawful or concluded a settlement

with the Competition Commission. Both sorts of fines may amount to up to 10% of the total group-turnover generated in *Switzerland* during the last three business years.

The CA provides for **whistle-blower/leniency rules** with respect to direct fines. Under these rules, the first enterprise informing the Competition Commission of an unlawful practice can get full immunity of fines. Full immunity, however, is not available to enterprises which have coerced other enterprises to participate in the unlawful practice or have been the originator or ring leader of the unlawful practice. Enterprises for which full immunity is not available (for example enterprises that inform the Competition Commission after another enterprise had already done so) may receive a reduction in fines of up to 50% for cooperating with the Competition Commission. The reduction depends on the significance of the added value of the cooperation (usefulness of submitted evidence etc.). Enterprises reporting another unrelated unlawful practice may receive a reduction in fines of up to 80%. In the *US*, this so-called amnesty-plus reduction has proven to be a very effective tool for competition authorities to detect cartel activity.

2. Abuse of a dominant position

2.1 Introduction

Enterprises having a dominant position must not impede other competitors (exclusive practices) or exploit their trading partners (customers, respectively suppliers) by abusing their dominant position. This analysis involves three steps:

- definition of the relevant market (see below *2.2.1*)
- assessment whether there is a dominant position. There are two kinds of dominance: Single firm dominance where one enterprise is dominant (see below *2.2.2*) and collective dominance where two or more enterprises jointly hold a dominant position (see below *2.2.3*).
- Assessment whether the dominant enterprise abuses its dominant position (see below *2.3.*)

An enterprise which abuses its dominant position may be fined in an amount of up to 10% of the turnover it generated in the last 3 business years in *Switzerland* (see below *2.4*).

2.2 Dominant position

2.2.1 Relevant market

The relevant market has a product and a geographic dimension:

The most common criterion to define the **product market** is demand-side substitutability. This concept asks which products are sufficiently similar in function, price and attributes to be regarded by users as reasonable substitutes for each other. Whether a product A is substitutable with product B may be determined by the SSNIP Test (Small but Significant Non-transitory Increase in Price): If a hypothetical, small (5%–10%) and permanent (1 year) increase in the price of product A would result in customers switching to product B and thereby making the price increase of product A unprofitable, product B is substitutable with Product A.

The **geographic market** is defined according to the analogous criteria by asking within which geographic area customers switch suppliers or would do so in response to an increase in prices. In addition, it is sometimes asked in which area the competitive conditions are sufficiently homogeneous to prevent geographic price discrimination. This approach may lead to a broader definition of the geographic market. For example, as regards grocery stores, the Competition Commission

has found that the relevant geographic market was *Switzerland* despite the fact that customers tend to shop within a radius not greater than 20 minutes of driving time.[9]

2.2.2 Single firm dominance

In assessing whether a particular enterprise enjoys single firm dominance in the relevant market, the following criteria are taken into account:

- **Market share**: A high market share is often seen as an indication of a dominant position (especially if the other competitors are multiple times smaller). In the past, enterprises found to be dominant had generally market shares in the region of 60%–100%.[10] However, in some decisions, the Competition Commission has held that also market shares as low as 40%–50% may indicate dominance.[11] Nevertheless, it should be stressed that market shares are only the starting point of the analysis. As the **Supreme Court** *(Bundesgericht; Tribunal fédéral)* rightly pointed out, a high market share can also imply effective competition if, for example, there are various substitutable products, but the customers chose the respective product because it is the most advantageous one.[12] Similarly, the Commission found in a case that an enterprise with a market share of 50%–70% was not dominant because its prices showed that it could not act independently from its competitors.[13]
- **Stability of market share**: Market shares dynamically changing over time, show the existence of effective competition, i.e. that the respective enterprise is not dominant. For example, the Competition Commission concluded in light of a decrease of a market share from 65% to 40% within 2–3 years that there was no dominant position.[14]
- **Market entry barriers/potential competition**: High market entry barriers or the lack of potential competition respectively are another indication for dominance. Potential competition exists where it is likely that new competitors may enter the market within a period of 2–3 years in a sufficient scale.
- **Countervailing power**: An enterprise may not be considered dominant where its trading partners have considerable buying power.
- **Other factors**: There may be other factors that indicate dominance, as for example if the respective enterprise is the only one which has a national distribution network, enjoys a much higher degree of brand awareness, etc.[15]

Due to a change of the wording of the revised CA, there is a debate on whether the notion of dominance is now broader. One member of the Competition Commission argues that the notion of

9 RPW 1997/3, 368 f. para. 24ff., Migros/Globus; RPW 2003/3, 571 f. para. 52ff., Coop/Waro.

10 See for example RPW 2001/1, 101 ff. para. 37 ff., Intensiv SA, Grancia (60%); RPW 2004/3, 788 para. 39, TicketCorner (70%–80%); RPW 1997/4, 500 para. 60, Recymet SA (88%); RPW 2001/2, 275 para. 115ff., Watt/Migros/EEF (100%); RPW 2004/1, 116 f. para. 46, Flughafen Zürich AG (Unique) – Valet Parking (100%); a (rare) example where an enterprise with a market share lower than 60% was found to dominate is Migros (40%–50%) RPW 2003/4, 764, Veterinärmedizinische Tests/Migros).

11 RPW 2004/3, 788 para. 39, TicketCorner; cf. also RPW 2003/4, 764, Veterinärmedizinische Tests/Migros.

12 BGE 130 II 459 para. 5.7.2.

13 RPW 2003/2, 245ff. para. 26ff., Vertrieb Veterinär-Nahtmaterial Johnson&Johnson.

14 RPW 2001/1, 92f. para. 33, Kaladent AG.

15 RPW 2004/3, 792 para. 42, TicketCorner.

dominance now includes – as the **German act against competition restrictions** (*Gesetz gegen Wettbewerbsbeschränkungen*) – also cases in which an enterprise has a superior position or in which other enterprises are dependent on a particular enterprise. However, this view cannot be sustained since the parliament revising the CA did not want to create a notion of dominance different from the one of the EC competition law.

2.2.3 Collective dominance

Collective dominance arises where two or more enterprises jointly have power over the relevant market, i.e., where the market structure is such that the enterprises necessarily collude instead of competing with each other. In assessing whether two or more enterprises are collectively dominant, the following criteria are taken into account:

- **Degree of concentration/market shares**: The more competitors there are the less likely a collective dominance is since the difficulties to collude increase exponentially with the number of players. Not surprisingly, the vast majority of cases where collective dominance has been found in the European Union in merger control proceedings concerned duopolies. However, in the only case where the Competition Commission found a collective dominance so far, it held that four credit card acquirers were collectively dominant (this decision, however, has been annulled by the **Appeals Commission** *[Rekurskommission für Wettbewerbsfragen; Commission de recours pour les questions de concurrence]*). As regards the combined market share, collective dominance can be excluded where the oligopolists have a joint market share of less than 50-60%.
- **Stability of market shares**: Where market shares among the oligopolists change over time, this is a clear indication of effective competition.
- **Market transparency**: Collusion is only possible where the market is sufficiently transparent for all members of the dominant oligopoly to be aware, sufficiently, precisely and quickly, of the way in which the other members' market conduct is evolving.
- **Market entry barriers/potential competition**: Collusion is only possible where market entry barriers are sufficiently high to prevent entry of new competitors.
- **Symmetries in cost**: Collusion will be only sustainable where the oligopolists have similar cost structures because otherwise there will be a strong incentive for deviating from a common strategy.
- **Countervailing power**: Collusion is unlikely where the trading partners of the oligopoly have a strong position.
- **Linkages**: The Competition Commission views corporate linkages (such as participations joint ventures) as an important tool for facilitating collusive behavior.
- **Retaliation**: For a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy. This implies that competitive action of one member must provoke identical action by the others members of the dominant oligopoly so that it would derive no benefit from its initiative.

2.3 Abuse

The general criterion applied by the Competition Commission to assess whether a specific practice constitutes an abuse of a dominant position, is to ask whether the practice can be justified by legitimate business reasons. If such justification is possible, the practice is lawful. Unfortunately, the criterion of legitimate business reasons is very vague so that it leaves a lot of room for for

discretion and makes decisions difficult to predict. Examples of potentially abusive practices include:

- **Predatory price-cutting**: Predatory price-cutting is unlawful where (1) prices are below variable costs and (2) there is a prospect of recouping losses by raising prices after having eliminated the competitors. This is in some contrast to EC competition law, where prices below variable costs are presumptively unlawful.
- **Excessive pricing**: There is no conclusive Swiss case law on excessively high prices. However, given the difficulties which are inherent to price regulation, competition authorities are reluctant to regulate prices. Instead, they are more likely to focus on practices by which a dominant enterprise seeks to strengthen or maintain its dominance. In addition, in *Switzerland*, regulating prices of dominant enterprises has been traditionally the task of the so-called Price Regulator *(Preisüberwacher; Surveillant des prix)* and not the task of the Competition Commission.
- **Prize Squeezing**: Price squeezing occurs where a vertically integrated firm is dominant in the upstream market and supplies goods to other enterprises that compete with the dominant firm in the downstream market. Price squeezing is sometimes practised in telecom markets where the incumbent former monopolist provides wholesale telecom services to its competitors at prices that are equal to or higher than its own retail prices. As a general rule, price squeezing is unlawful if the dominant enterprise could not profitably sell at its own retail prices if it had to pay its own wholesale prices.
- **Exclusive purchasing obligations**: It is likely that the Competition Commission will regard exclusive purchasing obligations with suspicion. The same applies to **fidelity rebates**, i.e. rebates whose amount depends on whether the purchaser buys its whole supply from the dominant enterprise and not based on the absolute quantities bought. Such rebates are thought by competition authorities to have an effect similar to exclusive purchasing obligations. However, linear quantity rebates as well as rebates that reflect only the reduced costs of the supplier in handling larger quantities do not constitute an abuse.
- **Exclusive distribution**: Similarly, the Competition Commission has held that exclusive agreements by which a dominant enterprise systematically requires its suppliers only to supply the dominant enterprise are abusive and absent any justification.
- **Discrimination**: The Competition Commission is likely to require that dominant enterprises treat like customers alike. Thus when dominant enterprises treat similar customers differently, the Competition Commission will require that there are objective reasons for treating these customers differently. As regards **price discrimination**, previous decisions of the Competition Commission show some willingness to require dominant enterprises not to discriminate customers with regard to prices (unless there is a cost justification). However, given that price discrimination is a widespread economic phenomenon and in most cases efficient, price discrimination should only be regarded as abusive where it involves predatory pricing, price squeezing or fidelity rebates.
- **Refusal to supply**: Even dominant enterprises are in general free to choose their business partners. The exact boundaries of this freedom remain to be determined, however. So far the Competition Commission has imposed a duty to supply other business partners on monopolists or near-monopolists only. An example is the duty of an electrical utility to run third parties' energy through own network. In addition, duties to supply may be limited in time. For instance, the *Swatch group*, a near monopolistic producer of mechanical raw clockworks, was only required to supply such clockworks to refiners for a transitional period of six years.

- **Tying**: The typical example of tying is the case where the supplier which has a dominant position in the product market for X, causes its buyers of product X (tying product) also to purchase product Y (tied product) from him. Such tying is likely to be found to be abusive where (1) customers would (the tying being absent) buy products X and Y from separate suppliers and (2) there is no justification for the tying such as technical difficulties if the products were not tied.

2.4 Consequences of an abuse of a dominant position

As already mentioned, the Competition Commission can impose direct fines on a dominant enterprise in an amount of to up to 10% of the total group-turnover generated in *Switzerland* during the last three business years.

In contrast to enterprises participating in cartel activity, full immunity from fines is not available for dominant enterprises abusing their position. Theoretically it is possible to get a reduction in fines of up to 50% by cooperating with the Competition Commission. However, given that often the trading partners of the dominant enterprises will provide the Competition Commission with the necessary information, the possibilities to achieve a reduction in fines is limited.

3. Merger control

Under the CA, a concentration has to be notified to the Secretariat of the Competition Commission if the enterprises involved fulfill certain turnover thresholds.

3.1 The notion of concentration

Under the Swiss Act on Cartels, the following transactions between previously independent enterprises qualify as concentrations:

- mergers
- acquisition of sole control over an enterprise
- acquisition of joint control over a full function joint venture

From the requirement that the transaction must occur between previously independent enterprises, it follows that pure intra-group transactions do not form a concentration within the meaning of the CA. For example, when two 100%–subsidiaries of the same parent company merge with each other, such merger does not form a concentration.

3.1.1 Mergers

A merger within the meaning of the CA occurs where a company is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity. A merger also occurs where two ore more independent companies amalgamate into a new company and cease to exist as separate legal entities.

In the absence of a merger under company law, a merger within the meaning of the CA also occurs where the combining of the activities of previously independent enterprises results in the creation of a single economic unit. Such to be the case, there must be (1) a common economic management (frequently established contractually) and (2) other factors such as internal profit and loss compensation, cross-shareholdings and/or external joint liability.

3.1.2 Acquisition of sole control

As a general note, the term "control" means the ability to **exercise a decisive influence** on the activities of the other enterprise. The means by which control can be acquired include, in particular, either separately or in combination:

- ownership or the right to use all or part of the assets of the enterprise
- rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an enterprise

Having said that, examples of acquisition of control include:

- the acquisition of the **majority of the voting rights** of a company
- the acquisition of **assets**
- the acquisition of a "**qualified minority**" in connection with other factors conferring control either on a legal and/or a *de facto* basis. On a **legal basis**, sole control can occur where for example the minority shareholder has the right to appoint the majority of the board of directors. On a **de facto** basis, sole control may occur where the minority shareholder is likely to achieve a majority at the shareholders' meeting. This may be the case where the remaining shares are widely dispersed and where it is unlikely that all of the remaining shareholders will be present at the shareholders' meeting

3.1.3 Acquisition of joint control over a full function joint venture

The acquisition of joint control does only constitute a concentration where (1) joint control is acquired over (2) a full function joint venture. In addition, in case of a creation of a new joint venture to be jointly controlled by the founding parent companies, a concentration only occurs where activities of at least one of the parent companies are contributed to the joint venture. As regards these conditions, the following has to be added:

Joint control exists where two or more enterprises have the possibility of exercising decisive influence over another enterprise (the joint venture). Unlike sole control which confers power of exercising decisive influence upon a specific shareholder, joint control is characterized by the possibility of a **deadlock situation** resulting from the power of two or more parent companies to reject proposed strategic decisions. This in turn implies that where changing coalitions among the parent companies are possible, no joint control exists.

The clearest form of joint control exists in 50/50 joint ventures. In the other cases, the power to block strategic actions is frequently conferred to by veto rights (granted by shareholder agreements and/or by the articles of association). While it is not required that such **veto rights** confer decisive influence on the day-to-day running of the joint venture, they must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors (such as changes in the articles of association, an increase or decrease in the capital, or the sale or winding-up of the joint venture). Veto rights conferring joint control typically include decisions and issues such as the business plan, the appointment of the senior management, major investments, and the budget. Note that for a finding of joint control, it is not necessary that all of the veto rights mentioned above are granted. It might be sufficient if only some or even only one such right exists.

A **full function joint venture** exists where the joint venture performs (1) all the functions of an autonomous economic entity (2) on a lasting basis:

- A joint venture does perform **the functions of an autonomous economic entity** if it has sufficient resources (finance, management, staff and assets) in order to conduct its business activities. In addition, a joint venture must be more than being auxiliary to its parents' activities without having access to the market (as is the case, for example, when its activities are limited to R&D or production). Likewise, a joint venture has no full function character if it acts principally as a sales agent for its parents). Similarly, where the joint venture relies almost entirely on sales to its parents for more than a start-up period of more than three years, it does not constitute a full function joint venture.
- A joint venture must be intended to **operate on a lasting basis**. This is usually the case where the parent companies commit the resources described above to the joint venture. However, where the joint venture is only established for a short finite duration, a long lasting basis is not present. As regards the necessary duration, normally, a five to ten year time horizon should be sufficient.

As already mentioned above, in case of a **creation of a new joint venture** to be jointly controlled by the founding parent companies, a concentration only occurs where activities of at least one of the parent companies are contributed to the joint venture. In other words, no concentration is deemed to arise where the founding parent companies (1) create a new joint venture to be active in a new area **and** (2) the parents only contribute cash but no other assets to the new joint venture.

3.2 Thresholds

The CA provides for two alternative thresholds under which a concentration has to be notified: a turnover threshold and a dominance threshold.

3.2.1 Turnover threshold

Under the turnover threshold, a concentration has to be notified if

- all enterprises involved generate a combined aggregate world–wide turnover of at least Sfr. 2 billion or a combined aggregate turnover of at least Sfr. 500 million in *Switzerland* **and**
- at least two of the enterprises involved generate a turnover of at least Sfr. 100 million each in *Switzerland.*

Hence, it is important to know which are the enterprises involved. This depends on the kind of concentration:

- **merger**: the enterprises involved are the merging enterprises
- acquisition of **sole control**: The enterprises involved are the enterprise acquiring control as well as the target. The seller, however, does not constitute an enterprise involved
- acquisition of **joint control**: The enterprises involved are the enterprises jointly acquiring control as well as the controlled joint venture

In some cases this leads to odd results. For example, if two enterprises acquire joint control over a joint venture which has no activities at all in *Switzerland*, this concentration has to be notified if both of these two parent companies generate more than Sfr. 100 million turnover in *Switzerland* and if all enterprises together have a combined turnover of Sfr. 2 billion worldwide or Sfr. 500 million in *Switzerland.*

In calculating the turnover of an enterprise involved, the turnover of the whole group it belongs to must be taken into account. Again, in case an enterprise sells one of its subsidiaries, only the turnover generated by the target is relevant.

In general, the turnover consists of the proceeds earned through the ordinary business activity of selling goods or services during the last business year prior to the signing. From these proceeds, all reductions on earnings such as discounts, rebates, value–added tax as well as other taxes directly allocated to the turnover have to be deducted.

As regards the **geographical allocation**, the turnover is attributed to the place where the customer is located.

3.2.2 Dominance threshold

Under the alternative threshold, a concentration has to be notified regardless of the turnover generated if

- a legally enforceable decision establishes that an enterprise concerned has a dominant position in a market in *Switzerland*, **and**
- the concentration concerns either the same or an upstream, downstream or neighboring market.

3.3 Competitive assessment

The Competition Commission may prohibit the concentration or authorize it subject to conditions or obligations if the investigation reveals that the concentration:

- creates or strengthens a dominant position which may eliminate effective competition **and**
- does not lead to an improvement of the competitive conditions in another market which prevails over the disadvantages of the dominant position.

While the second criterion was very rarely of significant practical relevance, there is some dispute of whether the term "dominant position which may eliminate effective competition" establishes a threshold higher than the dominance threshold used with regard to the abuse of a dominant position (see above *2.2*). So far, the Competition Commission has not decided this issue explicitly.

In assessing whether a concentration creates or strengthens a dominant position, the Competition Commission considers whether it would create or strengthen a single firm or a collective dominance.

3.3.1 Single firm dominance

In assessing the issue of single firm dominance, the Competition Commission takes into account the following effects:

- **Horizontal** effects: In examining horizontal effects, the Competition Commission looks as a first step at market share overlaps. Overlaps below 20% are presumed to be unproblematic. The same tends to be true where the overlap is only marginal, i.e., where one party has a very small market share (i.e. 1–2%). As regards the upper limit of market share threshold, there is no clear-cut threshold since market share figures say little about the competitive forces in a market. However, the criteria employed are more or less the same as used in the context of the abuse of a dominant position (see above *2.2.2*). Where no market share overlaps occur, the

Competition Commission normally has no concerns with regard to horizontal effects. A (very rare) exception is the case where the concentration removes a very strong potential competitor.

- **Vertical** effects: Anticompetitive vertical effects may arise in concentrations between enterprises each active on a different (upstream or downstream) level of trade. The main concern resulting from vertical concentrations are foreclosure effects. For example by merging with a dominant raw material supplier, a producer on the downstream level may foreclose the raw material supply to its competitors. In the past, the Competition Commission has been reluctant to ask for remedies based on vertical concerns.
- **Conglomerate** effects: The main example of anticompetitive conglomerate effects is portfolio power, i.e., the possibility to offer customers a portfolio of products belonging to separate product markets and thereby having the ability to exclude competitors which only offer a part of this portfolio. So far, the only case in which the Competition Commission seriously considered conglomerate effects as a reason to block a concentration was the *GE/Honeywell* case.

3.3.2 Collective dominance

In assessing whether a concentration creates a collective dominance, the Competition Commission uses the same criteria as described above in *2.2.3.*

So far, the Competition Commission found only once that a collective dominance would have been created as a result of a concentration (creation of a duopoly of *Coop/Bell* and *Migros* in the market for slaughtering poultry).

3.4 Procedure

Similar to the EC merger control, the Swiss merger control procedure has two phases: In phase I which starts the day after the **Secretariat of the Competition Commission** *(Sekretariat der Wettbewerbskommission; Secrétariat de la Commission de la Concurrence)* has received the complete notification, the Competition Commission has one month to decide whether it wants to initiate a phase II investigation. If the Competition Commission initiates a phase II investigation, it has to decide within four months whether it clears the concentration, prohibits it or asks for remedies, respectively. Unlike in the *EU*, there is no special (i.e. extended) deadline for phase I and II in case the parties offer conditions and obligations to remedy potential competitive concerns.

As regards remedies, the Competition Commission prefers structural remedies (such as the divestiture of a business unit) to behavioral ones. The reason is that behavioral remedies are more difficult to monitor and to enforce. In addition, the Competition Commission prefers conditions to obligations, meaning that remedies should be effective before closing. Often the Competition Commission has adopted the conditions and obligations which had been offered by the merging entities to the European Commission in the parallel European merger control proceeding.

The Competition Commission frequently asks the parties for permission to liaise with foreign competition authorities which are also reviewing the concentration such as the European Commission and the FTC. Such permission may enable the Competition Commission to speed up the procedure.

In case a reportable concentration is not notified, the Competition Commission may impose fines of up to Sfr. 1 million on the enterprise and/or fines in an amount of up to Sfr. 20,000 on members of the management involved (so far, the Competition Commission has only imposed fines on enterprises but not on members of the management). In addition, without clearance, the validity of the concentration under civil law remains suspended.

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