FOREIGN-TO-FOREIGN MERGERS CAUGHT BY THE COMPETITION ACT

The Swiss Supreme Court, deciding that a foreign merger must be notified to the Competition Commission if the thresholds set out by the Competition Act are reached, reversed the decision of the Appeals Commission, thus upholding Competition Commission ("Comco") practice.

According to Article 9 of the Competition Act, notification is mandatory if, during the financial year preceding the concentration:

– the aggregate worldwide turnover of the undertakings concerned amounted to at least two billion Swiss Francs or the aggregate turnover of the undertakings within Switzerland amounted to at least 500 million Swiss francs; and

– the aggregate turnover in Switzerland by each of at least two of the undertakings concerned amounted to at least 100 million Swiss Francs.

Moreover, pursuant to Article 2 of the Competition Act, the essential aim of the Act is to prohibit concentration that creates or strengthens a dominant position possibly leading to a significant impediment of competition in the Swiss market, i.e. concentration that produces "effects" in the Swiss market.

The Supreme Court's decision confirms a well-established Comco practice contested by Rhône-Poulenc and Merck & Co in the Merial case. Comco's view that foreign-to-foreign mergers are deemed to produce "effects" in the Swiss market the moment the Article 9 thresholds are reached is upheld by the Supreme Court as a correct application of the law.

Rhône-Poulenc and Merck & Co, having in July 1997 received the E.U. Commission's approval of a proposed merger, notified the merger to the Comco Secretariat on July 8, 1997, but failed to respect the one-month waiting period required by Article 32 of the Competition Act. Comco, acting under Article 51 of the Competition Act, imposed fines on both companies, who appealed.

Reversing the practice of the Comco, the Appeals Commission on July 4, 2000, ruled that, standing alone, a reaching of Article 9 thresholds is insufficient proof that a concentration produces "effects" in the Swiss market. According to the Appeals Commission, "effects" impeding competition in Switzerland must be examined on a case-by-case basis. For example, a concentration may be carried out without prior notification where the concentration's sole tie with the Swiss market consists in the sale of non-competing products in Switzerland, even if aggregate sales reach Article 9 thresholds. The Federal Department of Public Economy, charged with protecting the public interest in a correct administration of Swiss competition law, applied to the Supreme Court for review.

On April 24, 2001, the Supreme Court reversed the Appeals Commission's decision. The Supreme Court held that Articles 2 and 9 of the Competition Act must be interpreted as compatible. If Article 9 thresholds are reached, a concentration must presumptively be deemed to have the potential of producing effects in the Swiss market. The concentration must therefore be notified and may not be carried out prior to authorization. In fixing thresholds, Article 9 affords a statutory bench mark for application of the Article 2 "effects" principle. Article 9 thresholds also offer a "safe-harbor" enabling companies to calculate whether or not a proposed concentration must be notified. The Supreme Court pointed out that, when determining whether Article 9 thresholds have been reached, the participating companies' overall turnover must be taken into account and not simply their turnover in the sectors to be merged. Noting that E.U. control of proposed concentrations requires prior notification to the E.U. Commission, the Supreme Court suggested that notification of a concentration requiring Swiss as well as E.U. clearance might be simplified for foreign companies by allowing them to file simultaneous notification to the E.U. Commission and to Comco on forms providing similar data.

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