The Merger Control Review

Editor
Ilene Knable Gotts

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EDITOR'S PREFACE

*Ilene Knable Gotts**

Perhaps one of the most successful exports from the United States has been the adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world. Although adoption of pre-merger notification requirements was initially slow – with a 13-year gap between the enactment of the United States' Hart-Scott-Rodino Act in 1976 and the adoption of the European Community's merger regulation in 1989 – such laws were implemented at a rapid pace in the 1990s, and many more were adopted and amended in the last decade. China and India have just implemented comprehensive pre-merger review laws, and although their entry into this forum is recent, it is likely that they will become significant constituencies for transaction parties to deal with when trying to close their transactions. This book provides an overview of the process in 32 jurisdictions as well as an indication of recent decisions, strategic considerations and likely upcoming developments in each of these. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

As shown in further detail in the chapters, some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, United Kingdom), the vast majority impose mandatory notification requirements. With the exception of a few jurisdictions (e.g., Brazil), most require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close so long as notification is made prior to closing. Indonesia is at present considering adopting a pre-merger requirement to augment its current ability to investigate and take remedial action post-completion. Some jurisdictions impose strict time frames by which the parties must file their notification.

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For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Brazil requires that the notification be made within 15 business days of execution of the agreements; and Hungary and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification.

The United States was the first jurisdiction to adopt a process for mandatory pre-merger review by federal antitrust authorities. Very little has changed in the US process in the three decades since its implementation. Some aspects of the US process have been adopted by other jurisdictions. For instance, Canada has recently transformed its procedure to resemble the US style of review, with a simplified initial filing, a 30-day period to issue a detailed information request, and the waiting period tolled until the parties comply with the request. Offers to resolve competitive concerns are only considered by the US after the more detailed investigation has been carried out. The US and Canadian authorities must go to court to block a transaction's completion. Both jurisdictions can seek to challenge a completed merger, even if that transaction had aleady been reviewed pre-merger by the relevant authority; although in Canada, such challenges must be brought within one year of closing, while in the US there is no statute of limitations.

Most jurisdictions more closely conform with the European Union model. In these jurisdictions, pre-filing consultations are more common, parties can offer undertakings during the initial stage to resolve competitive concerns, and there is a set period during the second phase for providing additional information and the agency reaching a decision. Once the authority approves the transaction, it cannot later challenge the transaction's legality. Other jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU, however, that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales in Austria so long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, EU and Canadian authorities to work closely with one another during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common, for example, the Argentine authority has worked with Brazil; and Brazil's CADE has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia, Montenegro, and Slovenia similarly maintain close ties and cooperate on transactions. In transactions not requiring filings in multiple EU jurisdictions, member states often keep each other informed during the course of an investigation. In contrast, to date, it does not appear that China has worked cooperatively with any other competition authority, although it has 'consulted' with the US and EU or some mergers.

Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seems to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less is being acquired (for example, Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (for example, Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Russia, at any amount

exceeding 20 per cent of the target). Jurisdictions will often require require some measure of negative (e.g., veto) control rights, to the extent that it may give rise to *de jure* or *de facto* control (e.g., Turkey).

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked The Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Cartel Office blocked the merger worldwide even though less than 10 per cent of each of the undertakings was attributable to Germany. Thus, it is critical from the outset for counsel to develop a comprehensive plan to determine how to navigate the jurisdictions requiring notification, even if the companies operate primarily outside some of the jurisdictions. This book should provide a useful starting point in this important aspect of any cross-border transaction being contemplated in the current enforcement environment.

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SWITZERLAND

*Silvio Venturi, Pascal G Favre and Diane Nourissier**

I INTRODUCTION

Merger control in Switzerland is governed by the Federal Act on Cartels and Other Restrictions of Competition ('the ACart') and the Merger Control Ordinance ('the MCO'). These competition regulations came into force on 1 July 1996 and were first revised in 2003. The efficiency of the ACart has been recently re-evaluated by a group of experts ('the Taskforce Cartel Act') and a number of recommendations were transmitted to the Swiss Parliament at the beginning of 2009. According to the experts, some modifications to the Swiss competition regulations are necessary in order, *inter alia*, to improve the efficiency of the institutional organisation and enhance the control of concentrations.

Concentrations are assessed by the Competition Commission (www.weko.admin.ch/en), an independent federal authority based in Bern that consists of up to 15 members. There are currently 12 members who were nominated by the Swiss federal government, the majority of which are independent experts (i.e., law and economics professors). Deputies of business associations and consumer organisations take the other seats. Cases are prepared and processed by the Secretariat of the Competition Commission (with a staff of approximately 50 employees, mostly lawyers and economists), divided into three departments: product markets, services and infrastructure.

The types of transactions that are subject to merger control are, first, mergers of previously independent undertakings and, second, direct or indirect acquisitions of control by one or more undertakings over one or more previously independent undertakings, or parts thereof. Joint ventures are also subject to merger control if the joint venture company exercises all the functions of an independent business entity on a lasting basis; if a joint venture company is newly established, it is subject to merger

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control if, in addition to the above criteria, the business activities of at least one of the controlling shareholders are transferred to it.

Pursuant to Article 9 ACart, pre-merger notification and approval are required if two turnover thresholds are reached cumulatively: in the last business year prior to the concentration:

a the undertakings concerned must have reported a worldwide aggregate turnover of at least 2 billion Swiss francs or a Swiss aggregate turnover of at least 500 million Swiss francs; and

b at least two of the undertakings concerned must have reported individual turnovers in Switzerland of at least 100 million Swiss francs.

These thresholds are considered to be relatively high in comparison to international standards. Alternatively, a particularity of the Swiss regime is that if the Competition Commission has previously issued a legally binding decision stating that an undertaking held a dominant position in a particular market, such undertaking will have to notify all its concentrations, regardless of the turnover thresholds, provided that the concentration concerns that particular market or a market upstream, downstream or neighbouring. According to Article 4(2) ACart, an undertaking is considered to hold a dominant position if it is 'able, as regards supply and demand, to behave in a substantially independent manner with regard to the other participants in the market (competitors, suppliers, buyers)'.

If the thresholds are met or in the case of a dominant undertaking explained above, the concentration must be notified to the Competition Commission prior to its completion. If a transaction is implemented without notification or before clearance by the Competition Commission (or if the remedies imposed are not fulfilled), the companies involved may be fined up to 1 million Swiss francs. Members of the management may also be fined up to 20,000 Swiss francs. So far, the Competition Commission has imposed several fines on companies for failure to notify but there has been no criminal sanction of members of management. Furthermore, the Competition Commission may order the parties to reinstate effective competition by, for instance, unwinding the transaction.

The ACart does not stipulate any exemptions to the notification requirements. However if the Competition Commission has prohibited a concentration, the parties may in exceptional cases seek approval from the Swiss federal government if it can be demonstrated that the concentration is necessary for compelling public interest reasons. Such approval has, however, not been granted so far.

Specific rules apply to certain sectors. Thus, a concentration in the banking sector may be subject to a review by the Swiss Financial Market Supervisory Authority ('the FINMA'), who may take over a case involving banking institutions subject to the Federal Law on Banks and Saving Banks, and authorise or refuse a concentration for reasons of creditor protection, irrespective of the competition issues. If the parties involved in a concentration hold special concessions (e.g. radio, television, telecommunications, rail, air transport), a special authorisation by the sector-specific regulator may be required. Moreover, under the Federal Law on the Acquisition of Real Estate by Foreign Persons, for any concentration involving a foreign undertaking and a Swiss real estate company

holding a portfolio of residential properties in Switzerland, an approval of the competent cantonal or local authorities may also be needed.

II YEAR IN REVIEW

In 2009, 26 notifications of concentrations were filed to the Competition Commission. 19 cases were cleared after a preliminary investigation. Only five cases were investigated in depth (Phase II) and gave rise to four decisions of the Competition Commission.

Recent practice from the Competition Commission has given interesting insights into jurisdictional issues, the substantial test for assessing concentrations and other substantial issues, such as collective dominance and the failing firm defence.

Two important jurisdictional issues have been addressed by the Competition Commission in a recent communication dated 25 March 2009 ('the Communication'). The Competition Commission first clarified the concept of 'effect' in the Swiss market in the case of a joint venture. Article 2 of the ACart provides that the Act 'applies to practices that have an effect in Switzerland'. Until the Communication, the Competition Commission and the Swiss courts held that if the turnover thresholds of Article 9 ACart were reached, it should always be considered that there was an effect in the Swiss market. Thus, in the case of the creation of a joint venture with no activity in Switzerland but where the turnover thresholds were met by the parent companies, a notification was required (see, for example, the *Merial* decision of the Swiss Supreme Court of 24 April 2001). However, in the Communication, the Competition Commission takes a different approach: if the joint venture is not active in Switzerland (no activity or turnover in Switzerland – in particular no deliveries in Switzerland) and does not plan to be active in the future in Switzerland, then the creation of this joint venture does not have any effect in Switzerland and accordingly no notification is required, even if the turnover thresholds are met by the parent companies. This position, which departs from the *Merial* case, is to be welcomed as it will reduce the number of notifications in cases where there will obviously be no competition issues in Switzerland.

The second jurisdictional issue dealt with by the Communication generalises the position taken by the Competition Commission in its *Tamedia/PPSR (Edipresse)* decision dated 17 September 2009. In this case, the deal was structured into three phases over a period of three years with a shift from joint to sole control by Tamedia over that period. The Competition Commission decided that the deal could be considered as a single concentration only if the three following conditions were met: (1) constitution of joint control during a transition period, (2) a shift from joint control to sole control concluded in a binding agreement and (3) a transition period of one year at most. Until that decision, the Competition Commission considered that a transition period of up to three years was acceptable to analyse a case as a single concentration. However, to align its practice with that of the European Commission in its Jurisdictional Notice of 10 July 2007, the Competition Commission has decided to reduce the transition period to one year.

Under Swiss law, the substantial test to assess a concentration is very high compared to other jurisdictions, such as for example the EU. Pursuant to Article 10

ACart, the Competition Commission may prohibit a concentration or authorise it subject to conditions and obligations if the investigation indicates that the concentration:

a creates or strengthens a dominant position;

b liable to eliminate effective competition; and

c does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed.

In practice, the efficiency gains provided in the third part of the test have played no role so far. In two decisions issued in 2007, *Swissgrid* and *Berner Zeitung AG/20 Minuten (Schweitz) AG*, the Swiss Supreme Court had to determine whether a concentration could be prohibited if there was a mere creation or strengthening of a dominant position or whether conditions (a) and (b) (i.e., creation or strengthening of a dominant position and elimination of effective competition) were cumulative. This question has significant practical consequences as if the two conditions are cumulative, then a concentration may be authorised, even if a dominant position is created or strengthened, if it cannot be proved that the concentration will eliminate effective competition. In the *Swissgrid* case, seven Swiss electricity companies wanted to integrate their electricity-carrying network under a common company. The Swiss Supreme Court held that conditions (a) and (b) were cumulative. The reasoning followed by the Supreme Court was that merger control is part of the control of market structure. Therefore, in order to justify an administrative intervention, the concentration must result in a concrete negative change in the market structure and the competition must be altered. In this case, the court found that competition did not exist prior to the concentration. Accordingly, the concentration would not change the market conditions and the administrative intervention was not justified. In more recent cases (notably the above-mentioned *Tamedia/PPSR (Edipresse)* case), the Competition Commission examined whether the concentration could eliminate effective competition but in a way that might indicate that it is in fact reluctant to give an autonomous scope to that criterion.

In two recent cases in the retail distribution sector, *Migros/Denner* and *Coop/Carrefour*, the Competition Commission had the opportunity to develop its position as regards collective dominance. In substance, there is a situation of collective dominance where more than one undertaking dominates the market collectively (e.g., an oligopoly) and there is a risk that these undertakings tacitly adapt their behaviour to each other. In these cases, the Competition Commission attempted to show that incentives for tacit collusion would increase after the concentration, based on a theoretical reasoning using the following criteria: (1) number of participants involved, market share and market concentration, (2) symmetries (e.g., customer loyalty programmes, distribution channels), (3) market growth, (4) market transparency, (5) multi-market relations, (6) position of competitors and (7) potential competition. The Competition Commission found that collective dominance was established and ultimately cleared both acquisitions in second-phase procedures, but subject to far-reaching behavioural and structural commitments. While the Competition Commission provided extensive considerations to support its decisions, legal scholars consider that it failed to bring strict proof on all of the criteria necessary to establish a collective dominant position. In particular, the way the Competition Commission addressed the retaliation mechanisms between Migros and

Coop is often regarded as insufficient to permit conclusions to be drawn as to whether the collusion was stable and long-lasting.

Finally, the Competition Commission has had the opportunity to apply the failing division defence in its *Tamedia/PPSR (Edipresse)* decision. In the decision to refer the *Tamedia/PPSR* concentration to a second-stage assessment, the Competition Commission indicated its concern that the concentration might create or strengthen a dominant position in the markets for pendular readers in French-speaking Switzerland, considering the intent of the parties to merge the free French-language dailies *Le Matin Bleu* and *20 Minutes*, as well as in the market for early distribution of newspapers in the Romandie. However, the Competition Commission found, in substance, that the concentration did not pose a threat to the relevant markets. It held in particular that there was no room in the long run for two free dailies in the market for advertising in French-speaking Switzerland. Tamedia and Edipresse have incurred losses of millions of Swiss francs since they launched their free French-language dailies. The investigation showed that, in the absence of the concentration, *Le Matin Bleu* would inevitably have exited the market and, as a result, the market share of Edipresse would in any event have accrued to Tamedia. The investigation also showed that there was no less anti-competitive alternative transaction. This was demonstrated, *inter alia*, by the fact that no other publisher expressed interest in acquiring *Le Matin Bleu* in the current circumstances. The Competition Commission thus takes an approach to the failing division defence similar to that of the European Commission,[1] applying the same criteria as for the failing firm doctrine, but with a stricter application of the conditions (i.e. with a higher burden of proof). The idea is to prevent a company with an unprofitable division to announce its intention to close it in order to force competition authorities to authorise the sale.

III THE MERGER CONTROL REGIME

If the turnover thresholds are reached by the undertakings concerned or if the concentration involves a company holding an established dominant position, the filing of a merger notification is mandatory prior to the completion of the transaction. Under Swiss law, there are no deadlines for filing. A transaction can be notified prior to the signing of the final agreements. However, the parties have to demonstrate a good faith intention to enter into a binding agreement and to complete the transaction (in practice, the standard is similar to that of the European Commission). The Secretariat of the Competition Commission can be contacted on an informal basis before the notification. This can speed up the notification procedure (for example, the Secretariat can agree to waive some legal requirements in relation to the content of the notification).

In the case of mergers, the notification must be made jointly by the merging undertakings. If the transaction is an acquisition of control, the undertaking acquiring control is responsible for the filing. The filing fee for a Phase I investigation is a lump sum of 5,000 Swiss francs. In Phase II investigations, the Secretariat of the Competition Commission charges an hourly rate of 100 to 400 Swiss francs.

Once the notification form has been filed, if the Competition Commission considers that the filing was complete on the date of the filing, it will conduct a

1 See, for example, COMP/M.993 *Bertelsmann/Kirch/Premiere* and IV/M.1221 *Rewe/Meinl*.

preliminary investigation and have to decide within one month whether there is a need to open an in-depth investigation. If the Competition Commission decides to launch an in-depth investigation, it will have to complete it within four months.

As a rule, the closing of a transaction should not take place prior to the competition authorities' clearance. However, in specific cases, the authorities may allow a closing prior to clearance, for important reasons. This exception has been mainly used in cases of failing companies and, more recently, in the case of a pending public takeover bid. Contrary to the European merger control rules (Article 7 Paragraph 2 of the Council Regulation (EC) No. 139/2004), no exception for public bids is provided under Swiss law. Therefore, each case will be assessed individually. In the *Schaeffler/Continental* case (where Schaeffler and Continental eventually agreed on the conditions of a public takeover), the Competition Commission decided that a request for an early implementation of a concentration can be granted before the notification is submitted if three conditions are fulfilled: (1) the Competition Commission must be informed adequately about the concentration, (2) specific reasons must be given on why the notification cannot be submitted yet and (3) whether the transaction can be unwound must be assessed in case the concentration is not allowed by the Competition Commission after its review. In that case, these conditions were fulfilled. However, the Competition Commission imposed two additional conditions: the obligation not to exercise the voting rights except to conserve the full value of the investment and the obligation to submit a full notification within a relatively short period of time.

In practice, the one-month period for the Phase I investigation can be shortened in less complex filings, especially if a draft filing was submitted to the Competition Commission for review, prior to the formal notification.

If the Competition Commission decides to launch a Phase II investigation, it will publish this decision. It will then send questionnaires to the parties, as well as their competitors, suppliers and clients. Usually, a Phase II hearing with the parties takes place. If the parties propose remedies, close contact is established between the Secretariat and the undertakings involved to determine the scope. Ultimately however, the authority to impose remedies lies with the Competition Commission, which enjoys a wide power of discretion (subject to compliance with the principle of proportionality).

Third parties have no formal procedural rights at any moment of the procedure. If the Competition Commission opens a Phase II procedure, it will publish basic information about the concentration and allow third parties to state their position in writing within a certain deadline. The Competition Commission is not bound by third party opinions, or by answers to questionnaires. Third parties have no access to documents and no right to be heard. Moreover, the Swiss Supreme Court held that third parties are not entitled to any remedy against a decision of the Competition Commission to permit or prohibit a concentration.

A decision of the competition authority may be appealed within 30 days to the Swiss Administrative Court and ultimately to the Swiss Supreme Court. The duration of an appeal procedure varies but may well exceed one year at each stage.

IV OTHER STRATEGIC CONSIDERATIONS

The Competition Commission maintains close links with the European Commission. It accepts that, in cases were a notification has also been filed with the European

Commission, the parties provide the Form CO filing, annexed to the Swiss notification for reference. This reduces considerably the workload for the drafting of the Swiss notification, as the parties therefore only have to add specific data regarding the Swiss market. That said, while annexes to the Swiss notification may be provided in English, the main part of the notification must be drafted in one of the Swiss official languages (French, German or Italian).

The Competition Commission aims at giving decisions coherent with that of the European Commission, if a case has been notified both in Brussels and in Berne. To ensure compatible decision making, it is advisable for the parties to provide a waiver that allows the Competition Commission to liaise directly with the European Commission.

More generally, the report of the Taskforce Cartel Act presented in January 2009 (see Section V, *infra*) states that in the context of a growing globalisation, it would be appropriate for Switzerland to conclude cooperation agreements with its main trading partners, in order to make possible the exchange of confidential information between competition authorities.

V OUTLOOK & CONCLUSIONS

On 14 January 2009 the Swiss federal government was presented with a Synthesis Report issued by the Taskforce Cartel Act, a panel formed during winter 2006/2007 by the Head of the Federal Department of Economic Affairs to evaluate the ongoing effects and functioning of the ACart. Article 59a of the ACart requires the Swiss federal government to evaluate the efficiency and conformity of any proposed measure under the act before submitting a report and recommendation to Parliament in relation to such measure. The main observation of the evaluation is that the underlying concept of the Act, as introduced in 1995 and revised in 2003, should be maintained. Globally, it is not necessary to amend the instruments added in 2003.

However, as regards concentrations, the Task Force Cartel Act takes the view that compared to other countries, the Swiss system, which only prohibits concentrations that can eliminate effective competition, shows certain deficiencies and provides a relatively weak arsenal to effectively enhance competition. According to the panel of experts, a risk exists that concentrations having a strong negative effect on competition might be approved. They recommend a harmonisation of the Swiss merger control system with the EU merger control system to eliminate that risk and to reduce the administrative workload with respect to transnational concentrations, as well as the implementation of modern instruments to control the criteria governing intervention in the case of concentrations (SIEC test, efficiency defence and dynamic consumer welfare standard).

With respect to institutional changes (the Competition Commission and its Secretariat), the Task Force Cartel Act notes that there are issues regarding the size of the agency and its non professional members, the allocation of power between the Competition Commission and its Secretariat and its independence (some of its members represent lobbies). Therefore they recommend that the Competition Commission and the Secretariat merge to become a professional institution fully independent of political influences and business.

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Silvio Venturi obtained his *licence en droit* from Fribourg in 1987. He went on to achieve a doctor of laws, *summa cum laude* (Fribourg, 1994) and an LLM from Berkley Law School (1995). He was admitted to the Geneva Bar in 1995, where he was ranked first and has extensive international experience having worked for Cleary Gottlieb Steen & Hamilton. He has lectured at the University of Fribourg on various aspects of contract law. Silvio is also a highly regarded speaker on topics related to competition laws. Silvio also regularly publishes articles and updates on a wide range of legal issues. In particular, he published in 2008 a legal essay on the main principles of Swiss dominance law (*Fiches juridiques suisses,* No. 337, '*L'abus de position dominante en droit de la concurrence*') (co-author with Pascal G Favre). He is currently drafting the second edition of a chapter dedicated to the Swiss merger control in the *Commentaire romand* (the most comprehensive French-language commentary on Swiss competition law) (co-author with Pascal G Favre).

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Pascal G Favre achieved a doctor of laws, *summa cum laude* (Fribourg, 2005; awarded three prizes). He was admitted to the Geneva Bar in 2004, where he was ranked first. Pascal regularly publishes articles and updates on a wide range of legal issues. He has recently co-edited with Professor Pierre Tercier (Honorary Chairman of the International Chamber of Commerce's International Court of Arbitration) the fourth edition of *Les Contrats spéciaux*. It serves as a standard book in the field of Swiss contract law. Pascal is also a co-author of a legal essay on the main principles of Swiss dominance law and is currently drafting the second edition of a chapter dedicated to the Swiss merger control in the *Commentaire romand* (co-author with Silvio Venturi).

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Diane Nourissier obtained an LLB from King's College, London and a *maîtrise en droit* from the Panthéon-Sorbonne University in Paris in 2002. She went on to achieve a masters in European Law with honours (Panthéon-Sorbonne University, Paris, 2005) and an MBA from the ESSEC Business School (2006). She was admitted to the Paris Bar in 2006. Diane worked in the competition/antitrust team of Linklaters in Paris between 2005 and 2009. She joined Tavernier Tschanz in September 2009.

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