MERGER CONTROL IN THE NEW SWISS LAW ON COMPETITION

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In the last edition of the International Business Law Review, the authors explored the topics of *illicit agreements* and the *abuse of a dominant position* in the new Federal law of October 6, 1995 governing cartels and other competition restrictions ("LCart"), in effect as of July 1, 1996. The present contribution is a general presentation of the new provisions governing *merger control*. These provisions are found essentially in Articles 9 to 11 and 32 to 38 of the LCart as well as in the June 17, 1996 Regulation on Business Mergers Control (OCart).

Before the coming into force of the LCart, Swiss law did not have any real rules governing merger operation. In a rather imperfect fashion, the former law of December 20, 1985 on cartels and other similar organisations ("aLCart") focused particularly on market forces that resulted in agreements and dominant positions. With reference to merger control, the aLCart only provided for the opening of an investigation by the Cartel Commission to determine whether a merger had the effect of creating or strengthening a position having a determinant market influence. Yet such an inquiry could only be undertaken if proof of the merger's negative economic or social impacts was provided (Article 30 al, 1 aLCart). The absence of any preventive or repressive measures meant that the Commission could not exert any real control in the domain of merger control. No notification on the part of firms was required and the Commission could only make recommendations. As such, it could neither forbid nor compel firms to dismantle their mergers, nor could it coerce these firms into ridding themselves of certain of their segments. Furthermore, Article 30 al. 1 aLCart only allowed the Commission to channel the firms' behaviour, but gave it no power over structural changes.

Switzerland, however, did not want to adopt so strict a control regime as that of the European Union

(EU) and most of its member states. According to the Federal Council, *"merger control in Switzerland aims at preventing the appearance of strengthening of a dominant position in a closed market that would lead to the elimination of effective competition. On the other hand, if a merger takes place in a barrier-free open market or in a competitive international market, there is no risk of having a dominant position which would suppress effective competition"*. This main objective has led to the creation of a flexible control system quite favourable to businesses.

The presentation of this regime requires that the operations on which the control is based (I), that the evaluation criteria used by the Competition Commission and (II) that the procedure permitting the exercising of control (III) be made clear. The sanctions imposed on undertakings which do not respect these rules will only be outlined (IV).

I. Operations subject to control

Article 9 LCart requires the submission of a preliminary notification of all concentrations reaching a certain size and capable of affecting the Swiss market.

1. The Concept of concentration

Article 4 al. 3 LCart defines "concentration" as the *merger of two or more firms* or as the *acquisition* of one or more firms by one or more firms (takeover). To these two cases, the formation or acquisition of *joint ventures* must be added. In all of these cases, mergers can occur between: firms which are on the same level in the same market (horizontal merger); firms which are on different levels in the same market (vertical merger); or firms which operate in different markets (conglomerates).

1. Merger

The term merger refers to the grouping of firms into one economic unit. This can consist of a merger by absorption, in which case the absorbed undertaking disappears, or of a merger in which the identities of the previously existing firms disappear and a new firm is formed.

Article 4 al. 3 LCart specifies that merging firms must be legally and economically separate entities prior to the merger. Consequently, the grouping or restructuring of affiliated firms are not considered merger operations. Yet, being linked structurally is not a sufficient condition for the firms to escape regulatory control; one of the firms must not have any real autonomy in the market.

2. Takeover

A takeover of one undertaking by another occurs when, due to legal or factual circumstances, a undertaking has the *possibility* to exert a *determining influence* over the activities of another undertaking, without this power being necessarily implemented (Art. 1 *in initio* OCart). In the case of a merger, the controlled firm must have been a legally and economically independent firm before the takeover occurs.

Only the result – the takeover – is the determining factor. The manner in which the takeover is conducted matters little: it can be direct or indirect, may affect a part or the whole of a firm. Neither do the means used to accomplish the takeover constitute a determining factor. Generally, this will involve the "acquisition of stock" but can also consist of the "execution of a contract" (Art. 4 al. 3 LCart). When control is acquired by one company, a shareholding representing more than half of the voting rights will usually ensure control of the targeted firm. A minority shareholding can also suffice, if the remaining capital is not in the hands of a single shareholder and cannot influence the decision-making process, or if special rights are given to the minority shareholder (for example, preferred shares having the majority of voting rights). The takeover can also result from a *contract* if it confers substantial influence over the company, particularly on its decision-making bodies. A management contract or an agreement conferring property rights or rights over another firm's assets can also be used. A takeover can also occur by *all other means*. Usually, it will be the result of a combination of legal factors and facts. Even economic dependence can lead to *de facto control*, for example when important agreements allow for substantial influence on the target.

The concept of takeover should be limited to operations that lead to a firm's *long-term structural modification.* Therefore, means which do not entail structural changes do not lead to takeover in the legal sense, even if they allow for a certain amount of influence over a firm's commercial policy. For instance, the usual terms of a franchise contract do not lead to a takeover of the franchisee by the franchiser. Operations which do not affect the structure of firms but nevertheless influence their competitive behaviour may be analysed, as the case may, as unlawful agreements.

3. Joint Ventures

Swiss law does not distinguish between cooperative and concentrative joint ventures. To be subject to control, a joint venture must be under a joint control procedure and carry out, in a lasting manner, all of the functions of an autonomous economic entity (Art. 2 al. 1 OCart).

. The joint venture, whether it be newly constituted or acquired, should first be controlled jointly by two or more firms. Together, these firms should therefore be able to exercise a substantial influence over the joint venture's commercial policy. This power can result from equal voting or representation rights, from veto rights granted to minority shareholders the firm's strategic decisions, or from the joint exercise of voting rights on, for example, the basis of a shareholders' agreement.

b. A merger occurs in the case of an *acquisition* of a joint venture, only if the said joint venture has carried out, in a lasting manner, all of the functions of an autonomous economic entity (Art. 2 al. 1 OCart); and in the case of the creation of a joint venture, only if the said joint venture has carried out, in a lasting manner, all of the functions of an autonomous economic entity *and* that the activities of at least one of the founding firms are transferred to the joint venture (Art. 2 al. 2 OCart). To be regarded as an independent economic entity, the joint venture must accomplish *all of the functions* exercised by other firms operating in the same market. Consequently, it must have all of the necessary resources to act as an independent entity; it must neither limit its activities to one of the functions exercised by the founding firms, nor must it have the founding firms as the sole co-contracting parties. A joint venture can only be considered a merger if it exercises its functions in a lasting manner. In principle, this would not be the case of a firm constituted for the accomplishment of temporary duties or a specific project.

2. Merger Size

Mergers are only subject to control if they reach a certain thresholds. The legislator considers that mergers which reach these thresholds are capable of significantly impeding competition.

1. In General

The size of mergers is expressed in "worldwide" and "Swiss" turnover prior to the merger. For a merger to fall under preventive control, the participating firms must have realised a turnover of at least CHF 2 billion (worldwide) *or* a turnover of CHF 500 million in Switzerland; *and* two of the participating firms must have realised individually a minimum turnover of CHF 100 million in Switzerland.

The term *participating* firms refers to, in the case of a merger, the merging firms and in the case of an acquisition, the firm acquiring control and the targeted firm (but not the selling firm) (Art. 3 al. 1 OCart). If the merger or the acquisition only concerns a part of the firm, this part is considered as the participating firm (Art. 3 al. 2 OCart), and only the turnover of this part is taken into account. The "turnover of a participating firm" does not only include its own turnover, but also that of its subsidiaries, its parent and affiliated companies, and its joint ventures, (Art. 5 al. 1, 2 OCart).

These thresholds are very high given the size of the Swiss market. It is foreseeable that most of the grouping of firms will not fall under the Regulation.

2. Specific cases

The legislator has provided specific rules for particular sectors. According to each particular case, the thresholds have been adapted or replaced by other criteria.

. Dominant Firms. Regardless of the threshold, a merger falls under the regulation if it involves a firm holding a dominant position (already established by the Commission in a previous decision) in Switzerland, subject to the condition that the merger concerns the market in which the firm has a dominant position (or either in upstream, downstream and neighbouring markets) (Art. 9 al. 4 LCart). This extension of the Regulation is aimed at mergers which reinforce a dominant position yet do not fall under the Regulation due to the high threshold. Consequently, the Regulation now encompasses acquisitions of small-sized firms by firms benefiting from a dominant position.

b. Insurance Companies. If the merger involves insurance companies, the above thresholds must be reached by the total of gross annual premiums (Art. 9 al. 3 phr. 1 LCart), meaning all of the accounted premiums from the last fiscal period (Art. 6 al. 1 OCart).

c. The Media. If all of the participating firms are media firms, the above thresholds must be reached by twenty times their turnover (Art. 9 al. 2 LCart). If the merger also involves firms either partially or totally active in other sectors, the thresholds must be reached by twenty times the turnover

realised in the media sector in addition to the remaining turnover.

d. Banks. If the merger solely involves banks, the above thresholds must be reached by to 10% of their financial balance sheet. If the merger also involves other firms or firms partially active in other sectors, the threshold corresponds to 10% of the financial balance sheet in addition to the firms', or part of the firms', "non-banking" turnover. To determine the part of the financial balance sheet realised in Switzerland, the ratio between the debt derived from operations with persons domiciled in Switzerland (banks and clients) and the total amount of debt (Art. 9 al. 3 in fine LCart) must be established and then multiplied by the financial balance sheet sum (Art. 8 al. 2 in fine OCart).

1. The Swiss Character of Mergers

The new act applies to "situations which have effects in Switzerland, even if they occur abroad" (Art. 2 al. 2 LCart); the new act has thus incorporated the old regulation's principle of "effects". With regards to merger control, this principle is strictly linked to the size of the mergers subject to control; namely, when the merger reaches the Swiss size required by Article 9 LCart, it generally constitutes a "situation which has effects in Switzerland" and is therefore subject to control in Switzerland.

In particular, the effects principle means that a merger can be subject to control even if all of the participating firms have neither subsidiaries, affiliated companies nor premises in Switzerland (and irrespective of whether the merger has already been notified abroad, particularly to the EU Commission).

I. Merger Appraisal

The legislator has adopted very flexible evaluation criteria for mergers, and even if a merger shows itself to be harmful, the Competition Commission will have difficulty prohibiting it.

1. *Evaluation Criteria.* A merger is considered harmful if, after being examined, it proves to be the following:

i. It creates or reinforces a dominant position capable of eliminating effective competition; and

ii. It does not lead to the improvement of competitive conditions in another market, which can override the drawbacks associated with the dominant position (Art. 10 al. 2 LCart).

The grouping which results from a merger must hold a *dominant position*, whether this is the result of a new position or that of a strengthening of a former position. This is the same concept as that contained in Art. 7 LCart, which covers the abuses linked to a dominant position. The grouping therefore benefits from such a position if it is able to behave in an essentially independent manner in relation to the other-market participants (Art. 4 al. 2 LCart).

A dominant position can be defined only in relation to a given market. It is necessary therefore first to determine the product market under consideration as well as its geographic positioning and then to examine whether the firm has a dominant position in this market. The product market consists of all the products or services substitutable, due to their characteristics and uses (Art. 11 al. 3 lit. a OCart). The geographic market corresponds to the territory on which the potential partners of the operation are engaged, on the side of supply and demand, for products or services which constitute the product market (Art. 11 al. 3 lit. b OCart).

The regime is very favourable to mergers:

- A prohibition can only come into force if effective competition is capable of being *eliminated* and not, as is the case in EC, if it is only "significantly hindered". Since what is being determined is whether the situation created is susceptible of eliminating competition, the investigation requires the future conditions of the market to be taken into consideration. As the Federal Council indicates, "in all probability, the suppression of competition will rarely be upheld". The suppression of competition is indeed unimaginable in any other markets than local geographic markets or national markets; moreover, the undertakings active in these markets generally will not reach the stipulated thresholds. As a rule, mergers subject to regulation will involve firms active on international markets. The creation or the strengthening of a dominant position is difficult to establish in such markets.

- Even if effective competition is susceptible of being eliminated, the merger should be authorised when it leads to an *improvement of the conditions of competition in another market*. This "improvement" acts as a real justifying motive, a motive absent in EC law. The assumption is targeted at mergers involving firms active in different markets (conglomerates). The effects of such a merger should first be analysed for each of the concerned markets, to decide on whether effective competition can be eliminated, and then be globally evaluated, according to the weighing up of the positive and negative effects on the concerned markets.

2. In its investigation, the Commission not only must take into account the actual effects of the merger on the Swiss market, but also must take into account the *market's evolution* and the situations of firms in international competition (Art. 10 al. 4 LCart). These factors, which render the regulation even more favourable to firms, should have a certain weight in the evaluation of mergers, as these mergers generally will be of an international scope in view of the thresholds stipulated in the new act. The competitiveness of firms at an international level could justify a grouping which could be considered harmful on a Swiss scale.

3. When mergers involve *banks*, and when protecting the interests of creditors is crucial, the act provides that "these interests can be given priority" (Art. 10 al. 3 LCart). In this particular assumption, the Commission must restrict itself to giving its opinion, the final decision belonging to the Federal Banking Commission.

I. The control procedure

The authorities in charge of applying the new act, the administrative procedure and the legal remedies available with respect to unlawful agreements and to abuses of a dominant position have already been described (see IBLJ 1997/1). Only the procedure regarding merger control will be discussed below.

1. Notification

Generally, the procedure of merger control is initiated by the notification of this merger to the Commission; nevertheless, if the concerned firms go through with the merger without notification, the procedure is initiated immediately (Art. 35 LCart).

. *The notifying undertakings*. Notifications should be made in the case of a merger, jointly by the participating firms, i.e. the merging firms, and in the case of an acquisition, by the firm (or jointly by the firms) who are acquiring control. In case of joint notification (a procedure which allows for only one notification), a common representative shall be appointed (Art. 9 al. 2 OCart). Furthermore, firms domiciled in a foreign country shall elect domicile of notification in Switzerland (Art. 9 al. 3 OCart). In the ten days following the reception of the notification, the

Commission's Secretariat delivers an attestation to the firms confirming that the notification has been correctly completed; should this not be the case, it invites the firms concerned to complete the notification (Art. 14 OCart).

b. *The timing of notification*. According to Art. 9 al. 1 LCart, mergers must be notified "prior to their completion", that is to say, prior to the performance of the agreement. Notification can therefore be accomplished – and in general will be for reasons of confidentiality – after negotiations and the signing of the merger agreement. The law does not specify at what moment the merger can be notified by the concerned firms.

c. *The contents of notification*. Art. 11 OCart details the content of the notification and accompanying documents. In particular, the notification should give details on the product and geographic markets affected by the merger as well as on markets in which the total market share of two or more of the participating firms in the Swiss market is 20 % or more, or on markets in which one of the participating firms' market share in Switzerland is 30 % or more (Art. 11 al. 1 d OCart). The information in question may be provided on a specific form.

1. The Preliminary Investigation

Upon receipt of notification, the Commission's Secretariat conducts a *preliminary investigation* to examine whether there are any "indications" that the merger creates or reinforces a dominant position (Art. 10 al. 1, 32 al. 1 phr. 1 LCart). At this stage, the Commission does not examine yet the merger's effects on competition.

2. The Examination Procedure

If indications of the creation or reinforcing of a dominant position are found, the Commission must open an *investigation procedure* (Art. 10 al. 1 LCart) and must communicate this decision to the firms concerned in the month following notification. The main part of the notification is then published and third parties are invited to present their opinions on the merger, usually in written form, in a time limit specified in the publication (Art. 33 al. 1 LCart). The Commission has four months, starting from the opening of the procedure, to complete the investigation (Art. 33 al. 3 LCart). The firms can ask for this time limit of four months to be extended.

The merger's outcome can be resumed as follows: During the period between the notification and the communication of the decision to open an investigation procedure (and assuming that this communication occurs, at the latest, at the end of the month following notification), the firms cannot implement the merger unless the Commission, due to significant justifying reasons, gives special authorisation for their request (Art. 32 al. 2 LCart); if the merger is implemented without this authorisation, its legal effects are suspended (Art. 34 *in initio* LCart). If the Commission does not communicate its decision to open an investigation procedure within the month following notification, the undertakings are free to conclude their merger; thus concluded, the merger is fully effective (Art. 34 *in initio* LCart). If the Commission communicates its decision to open an investigation procedure in the month following notification, it must decide immediately if the merger remains suspended or if it can be implemented provisionally (Art. 33 al. 2 LCart). If the Commission has not completed its investigation in the four month time limit following the opening of the investigation procedure, the merger is deemed authorised, unless the participating firms have not respected this time limit (Art. 34 *in fine* and 33 al. 3 LCart). Note that operations undertaken with a view to completing a merger are never void *ab initio*. At most, their legal effects are suspended pending a definite decision from the Commission or, if no decision is communicated, until the passing of the one month time limit.

In the investigation procedure, only the "concerned firms" have the standing of parties (Art. 43 al. 4 LCart), to the exclusion of third parties, even if the latter can present their opinions on the merger (Art. 33 al. 1 LCart) and must furnish all relevant information and all necessary documents to the Secretariat.

3. The Commission's Decision

The new Swiss regulation is based on a system of obligatory notification accompanied by an *opposition procedure* and not on one of formal approbation as is the case in Community law; therefore, the notification does not entail necessarily a decision from the Commission. If the Commission does not communicate the opening of the investigation procedure to the firms in the month following notification, the firms are free to implement their merger. On a first appraisal, the regulation presents the inconvenience of having firms wait during the one-month time limit. The Commission, however, can inform the firms that the merger does not raise any objections before the end of the one-month period.

At the end of the investigation procedure, the Commission can *prohibit the merger or authorise it subject to certain conditions.* In virtue of the principle of proportionality, the Commission should only prohibit the merger whenever all other solutions are excluded. If the merger is authorised, the

authorisation can be revoked if it was obtained on the basis of fraudulent actions or false information, or if the participating firms seriously violate a duty linked to the authorisation (Art. 38 al. 2 LCart).

4. Restoring Effective Competition

When a merger is subject to an effective prohibition decision and has been implemented, it must be restructured or even undone in order to *restore effective competition.* The adoption of measures necessary to restore competition is primarily the responsibility of the firms in question (Art. 37 al. 1 LCart). If necessary, the Commission can grant a period in which the firms can submit a proposal concerning the limiting constraints involved in their case (Art. 37 al. 2 LCart). If the Commission accepts the submitted proposal, it can decide on the method of implementation to be used. If the proposal is refused, respecting the principle of proportionality, the Commission can take all necessary measures to restore effective competition and, in particular, can order that the *ex ante* situation be re-established (Art. 37 al. 3, 4 LCart).

5. Extraordinary Procedure

As is the case with agreements and the abuse of a dominant position (cf. Art. 8 LCart), a special procedure is still possible when a merger has been prohibited by the Commission (Art. 11 LCart). According to this procedure, the concerned undertakings have a period of thirty days, starting from the coming into force of the Commission's prohibition decision (Art. 36 *in initio* LCart), or of the confirmation of this decision by the Appeal Commission (Art. 36 al. 2 LCart), to ask the Federal Council for an exceptional authorisation on the basis of preponderant public interests. The authorisation is granted only in the case that the protection of these interests is necessary, and not only beneficial, to these interests.

The Federal Council has four months upon receipt of the request to render its decision (Art. 36 al. 3 LCart). Authorisation should only be given in exceptional cases, after a full assessment has been conducted, taking into account political considerations more than the market's competitive conditions. The Federal Council's decision is not subject to appeal.

I. Sanctions

The law provides for administrative sanctions against firms and criminal sanctions against the firms' responsible persons; both types of sanctions are cumulative.

1. On an *administrative level*, a fine of CHF 1,000,000 or more is imposed in the event that a merger has been implemented without prior notification, the merger's provisional prohibition has not been respected, a charge has been violated, a prohibited merger has been completed, or a measure aimed at restoring effective competition has not been implemented (Art. 51 al. 1 LCart). In the event of a repetition of an offence involving a charge, the fine can reach 10 % of the total turnover realised in Switzerland by the participating firms (Art.
2. 51 al. 2 LCart). The fine cannot go above CHF 100,000 if the non-observance concerns an obligation to inform or to produce documents to the authorities (Art. 53 LCart). The law does not set an upper limit for the fine; the total amount will depend upon the particular case.

3. On the *criminal level*, persons acting on behalf of firms and responsible for violating decisions linked to the merger, for completing a merger without prior notification, or for violating the obligation to inform the authorities, are punishable by a fine of up to CHF 20,000 (Art. 55 LCart). In all cases, the responsible persons must have decision-making power for the company and must have acted intentionally. Criminal action is barred at the end of two years (Art. 56 al. 2 LCart).

Conclusions

With the coming into force of the new law, Switzerland has equipped itself with a real merger control regulation and, in doing so, joins most European states. Merger operations must be notified to the competition authorities, which now have the necessary means to watch over the maintenance of effective competition.

The regulation put into place is intentionally favourable to undertakings. Firstly, merger operations are submitted to control only when they reach very high thresholds. Secondly, a merger is accepted as long as it does not lead to a dominant position susceptible of eliminating competition; such a result is improbable if the merger is of an international scope. Finally, even if competition is eliminated, the taking into account of the competitive conditions in another market, of the market's evolution and the position of the undertakings in international competition still can lead to the acceptance of the merger.

The condition of the suppression of competition makes the Swiss regime more favourable to firms than

that of Community law. It is foreseeable therefore, that mergers already accepted by the Community authorities also will be accepted by the Swiss authorities. Nevertheless, the Swiss authorities' interpretation of the law must be considered.