Switzerland

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MERGER CONTROL

1. Are mergers and acquisitions subject to merger control in your jurisdiction? If so, please describe briefly the regulatory framework and authorities.

Mergers and acquisitions are regulated by the Cartels and Other Restraints of Competition Act 1995 (Competition Act) and the Regulation on the Control of Concentrations between Companies 1996 (Merger Regulation).

Mergers, including foreign-to-foreign mergers, are subject to merger control where the thresholds set by the Competition Act are reached (*see Question 2*).

The Federal Competition Commission (FCC) has primary responsibility for enforcing competition rules and the FCC's Secretariat (Secretariat) conducts preliminary and regular investigations (*see Question 3* and *box, The regulatory authorities*).

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

A transaction is subject to control if it is a concentration and certain thresholds are met. A concentration is either (*Competition Act*):

- The merger of two or more previously independent undertakings (either by absorption or by formation of a new entity).
- Any operation that enables one or several companies to take direct or indirect control over one or several previously independent companies (or part of them).

Exclusive or joint control over another company occurs when, as a result of legal or factual circumstances, the acquiring undertaking can exert a determining influence over the strategic business decisions of the target (whether or not this power is actually used).

Thresholds

Notification of a concentration is compulsory if, during the financial year preceding the concentration, both:

- The aggregate worldwide turnover of the undertakings concerned amounted to at least CHF2 billion (about US$1.6 billion) or the aggregate turnover of the undertakings within Switzerland amounted to at least CHF500 million (about US$400 million).
- The aggregate turnover in Switzerland by each of at least two of the undertakings concerned amounted to at least CHF100 million (about US$80 million).

The Competition Act also contains special rules to determine and calculate the relevant thresholds for businesses in specific areas (such as insurance companies and banks) (*see Question 12*).

If a party to a planned concentration already enjoys a dominant position in the Swiss market, which has been ascertained in a Swiss competition authority's decision, the concentration must be notified, even if it does not reach the above thresholds, if the planned concentration relates to either:

- The market in which the party holds the dominant position.
- A neighbouring (upstream or downstream) market.

3. Please give a broad overview of notification requirements. In particular:

- **Is notification mandatory or voluntary?**
- **When should a transaction be notified?**
- **Is it possible to obtain formal or informal guidance before notification?**
- **Who should notify?**
- **To which authority should notification be made?**
- **What form of notification is used?**
- **Is there a filing fee? If so, how much?**
- **Is there an obligation to suspend the transaction pending the outcome of an investigation?**

- **Mandatory or voluntary.** Notification is mandatory if a proposed concentration meets the thresholds set out by the Competition Act or if one of the undertakings concerned already enjoys a dominant position (*see Question 2*).
- **Timing.** There is no deadline for filing, provided that the proposed concentration is notified before it is carried out.

- **Formal/informal guidance.** The Secretariat 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).
- **Responsibility for notification.** Notification is made jointly by both undertakings in a merger, and by the acquiring undertaking in a takeover. Companies domiciled in a foreign country must use a Swiss address for notification.
- **Relevant authority.** Notification is made to the FCC.
- **Form of notification.** Notification must be submitted on a form issued by the FCC, which is based on the EU Form CO. The notification can be in German, French or Italian. Supporting documents can be in English. If a concentration has already been notified to the European Commission or other foreign authorities, a simplified notification can be filed with the FCC.
- **Filing fee.** Fees are charged on an hourly basis ranging from CHF100 (about US$80) to CHF400 (about US$320), depending on the case, its urgency and the class of the employee dealing with the case (*Federal Council Fee Regulation 1998*). The preliminary investigation conducted by the Secretariat (*see Question 4*) triggers a fixed fee of CHF5,000 (about US$4,000) in lieu of the hourly fees.
- **Obligation to suspend.** The FCC has one month to decide whether to open a regular investigation (*see Question 4*). The concentration must be suspended during this period, unless the FCC authorises otherwise at the companies' request. If, at the end of one month, the FCC has cleared the concentration or failed to make a decision, the concentration can be implemented.

  If no decision is made within four months of opening a regular investigation, or if the concentration is cleared, it can be freely implemented provided that the undertakings concerned are not responsible for the FCC being unable to make a decision in time.

4. Please set out the procedure and timetable.

Parties to a merger must establish whether there is a concentration within the meaning of the Competition Act and, if so, whether they meet the relevant turnover criteria or have a dominant position in a neighbouring market as ascertained in a legally enforceable decision (*see Question 2*). If so, the parties must notify the FCC, which has a two-tier procedure with a preliminary and a regular investigation.

The preliminary investigation starts on receipt of notification. The Secretariat must decide, within one month, whether the concentration might create or strengthen a dominant position. If no notification of opening a regular investigation is received from the FCC within one month, the concentration is automatically cleared (without needing formal authorisation).

If there are indications that the concentration might create or strengthen a dominant position, the FCC begins a regular investigation. In addition to notifying its decision to open investigative proceedings, the FCC must publish the essential elements of the proposed concentration within one month of the parties' initial notification. The FCC applies a two-tier test for this investigation (*see Question 7*). A final decision must be made within four months of opening the investigation (*see also Question 3, Obligation to suspend*). At the end of the investigation, the FCC can do any of the following:

- Clear the merger (*see Question 7*).
- Clear the merger subject to conditions (*see Question 8*).
- Prohibit the merger.

For an overview of the notification process, see flowchart, *Switzerland: merger notifications*.

5. How much publicity is given about merger inquiries? At what stage of the procedure is information released? Is certain information automatically kept confidential, and can the parties request that information is kept confidential?

The FCC must publish its decision to open regular investigative proceedings in the *Federal Bulletin* and the *Swiss Official Commercial Gazette*, which includes the following information about the undertakings involved:

- Their names.
- Their domicile.
- Their business activities.
- A brief description of the merger.

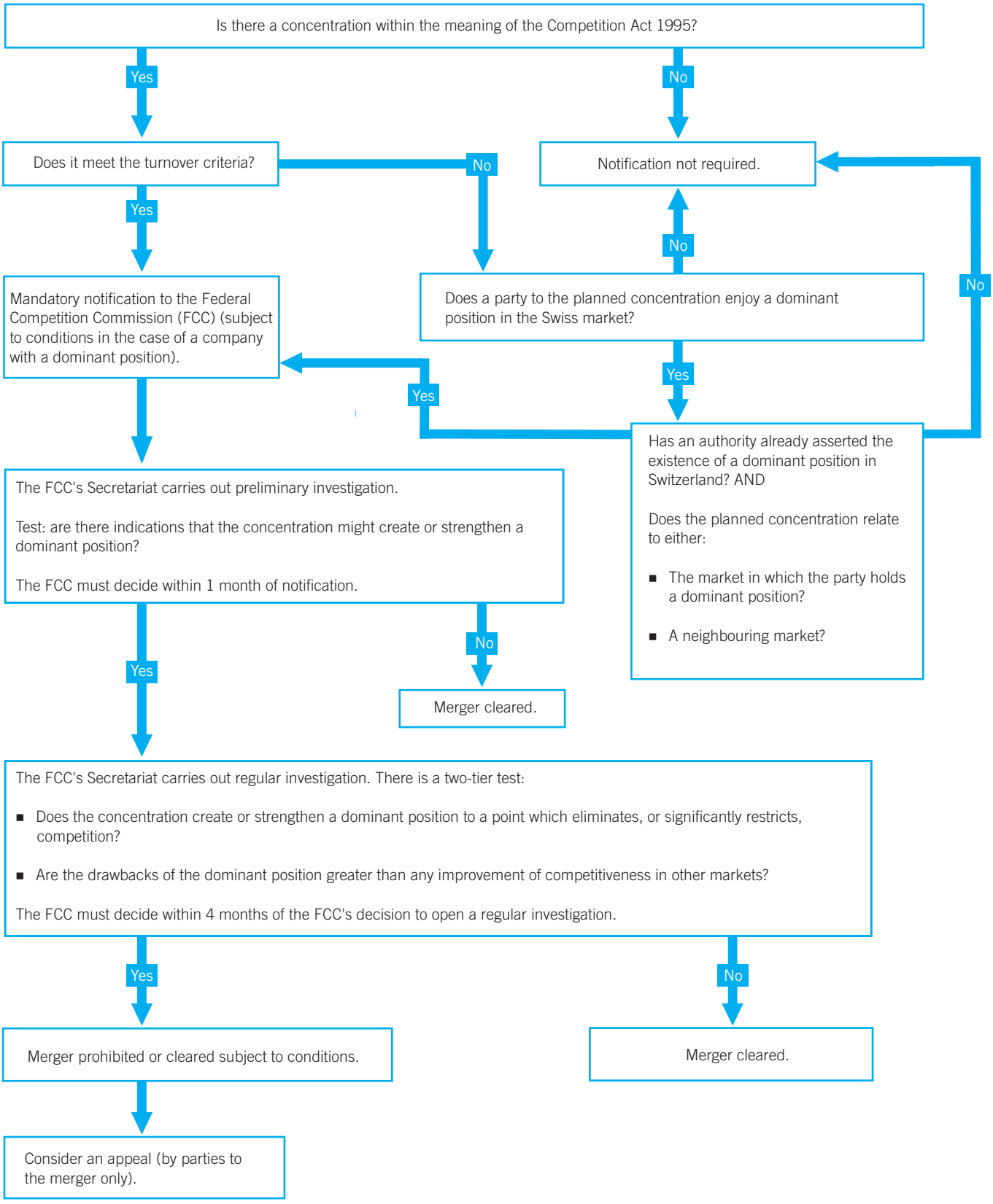
It will also specify the period during which third parties can comment on the proposed merger.

The FCC's publications do not reveal any business secrets.

6. Can third parties be involved in the procedure and, if so, how? What rights do they have to make representations, access documents or be heard?

Competitors and third parties can submit their views on the contemplated concentration once the FCC decides to begin a regular investigation. They must do so within the time limit stipulated by the FCC. However, they are not parties to the examination proceedings and so have no access to documents or right to be heard.

SWITZERLAND: MERGER NOTIFICATIONS



7. What is the substantive test?

The FCC examines whether a concentration:

- Creates or strengthens a dominant position which eliminates, or significantly restricts, competition.
- Improves competitiveness in other markets to an extent that exceeds the drawbacks of the dominant position.

A concentration is usually automatically cleared by the FCC at the end of a preliminary investigation provided that both:

- No single undertaking involved in the concentration has a market share in excess of 30%.
- The combined market share of two or more participating undertakings does not exceed 20%.

These thresholds operate as a "safe harbour" and allow undertakings to determine quickly that a concentration should not raise any competition concerns.

8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

The FCC can authorise a concentration subject to a number of conditions or obligations. These can be structural (such as divestiture of assets or subsidiaries), behavioural (such as suppression of exclusivity clauses, granting of access to essential facilities or prohibition of crossed subsidies), or both.

These conditions and obligations can also be the result of negotiations between the undertakings involved and the FCC.

In a few cases, the FCC has cleared a concentration on the basis of commitments submitted by the parties during the preliminary investigation. However, such clearance decisions at the stage of the preliminary investigation are exceptional and do not have a legal basis.

Remedies can be offered any time before the FCC's decision.

9. What are the penalties for:

- **Failure to notify correctly?**
- **Implementation before approval or after prohibition of the merger?**
- **Failure to observe a decision of the regulator (including any remedial undertakings)?**

- **Failure to notify correctly.** The failure to notify or a delay in notifying a concentration is a serious breach of the law, which can lead to administrative fines (for the undertakings) of up to CHF1 million (about US$800,058).
- **Implementation before approval or after prohibition.** If a merger that is subject to notification is closed before clearance or despite its prohibition, the undertakings involved are liable to be fined an amount up to CHF1 million and may be required to take measures to reinstate effective competition (by unwinding the transaction, by ceasing to exercise effective control or by any other appropriate actions).
- **Failure to observe.** Failure to comply with a condition attached to an approval can lead to administrative fines (for the undertakings) of up to CHF1 million. For repeated infringement of the conditions attached to an approval, the undertakings may be fined up to 10% of their aggregate turnover in Switzerland.

The amount of the fine depends mainly on the turnover, in Switzerland, of the undertakings concerned, whether prima facie the concentration represents a threat to competition and whether the concentration has created or reinforced a dominant position in Switzerland (without enhancing competition in another market in a way that outweighs the negative effects of the dominant market position).

If parties fail to notify, the FCC automatically initiates a merger control procedure as soon as it becomes aware of the failure. Implementation of the merger agreement is suspended during an investigation, unless, in certain circumstances, the FCC authorises it on a temporary basis.

Failure to notify and failure to observe an FCC decision in relation to concentrations is also a criminal offence and individuals, if found guilty, can be personally fined up to CHF20,000 (about US$16,001).

If fines are not paid, the FCC can convert them intoarrest, as an alternative form of sanction, using the concept of *ultima ratio* (final means).

If an undertaking fails to notify a concentration, the operation is automatically suspended until the FCC has issued a decision on whether the concentration raises competition concerns.

To date, the FCC has imposed several fines on undertakings, which did not file or filed too late. However, managers of undertakings have not been fined in practice so far.

10. Is there a right of appeal against any decision and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only the parties to the decision?

All decisions made by the Secretariat or the FCC are subject to judicial review by the Appeal Commission for Competition Matters (Appeal Commission) up until 31 December 2006 and by the Federal Administrative Court (FAC) from 1 January onwards. A final decision of the FCC (such as a prohibition of the merger) can be appealed within 30 days of receipt. Further appeals can be made to the Federal Supreme Court.

Appeals can be made by the parties to the merger, that is the purchaser and the target, or the joint venture and its controlling entities. As third parties are not parties to the examination proceedings (*see Question 6*), they are not entitled to appeal a decision relating to concentrations, irrespective of any interest they may have.

11. If a merger is cleared, are any restrictive provisions in the agreements (such as non-compete covenants) automatically cleared? If they are not automatically cleared, how are they regulated?

Agreements that are directly related to, and necessary for, the implementation of the concentration (ancillary restraints) and that are usually entered into in the context of a merger or acquisition, are subject to investigation by the FCC. If the merger is cleared, these agreements are also cleared.

If the agreements are not directly related to, and necessary for, the implementation of the concentration, a separate investigation might take place to determine whether they comply with the cartel rules of the Competition Act (*see Question 13*).

12. Are any industries specifically regulated?

The Competition Act contains special rules for the determination and calculation of the relevant thresholds for mergers involving:

- **Insurance companies.** The threshold value (*see Question 2*) is calculated according to the total value of gross annual premiums.
- **Banks or other financial intermediaries.** The threshold value (*see Question 2*) is calculated according to the total value of gross annual profits.

RESTRICTIVE AGREEMENTS AND PRACTICES

13. Are restrictive agreements and practices regulated? If so, please give a broad overview of the substantive provisions and regulatory authority.

The Competition Act regulates binding and non-binding arrangements (including gentlemen's agreements) and concerted practices, which have, as their object or effect, the restriction of competition in Switzerland. The FCC enforces this. Arrangements can be created between undertakings at the same market level (horizontal agreements) or different market levels (vertical agreements).

Agreements are prohibited only if they eliminate or appreciably restrict competition, which are assessed as follows;

- **Appreciable restriction of competition.** This is assessed in qualitative rather than quantitative terms. According to the FCC, vertical agreements are assumed not to have an appreciable effect on the market if the undertakings do not hold a combined market share over 10% (*de minimis* clause), unless they include any of the following arrangements (*Communication on Vertical Restraints, 18 February 2002*):
  - price-fixing;
  - restrictions on where, or to whom, a buyer can sell;
  - restrictions on sales to the final consumer within a selective distribution system or cross-sales among members of the same selective distribution system;
  - non-compete obligations for a duration exceeding five years (single branding) or one year after expiry of the agreement.
- **Elimination of competition.** Agreements that eliminate competition (hard-core cartels) are prohibited and cannot be justified on grounds of economic efficiency.

  Horizontal agreements are deemed to eliminate competition if they include any of the following arrangements:
  - direct or indirect price-fixing (such as agreements on discounts or tariffs fixed by a professional association, including non-binding recommended prices if they are followed by the association's members);
  - limits on the production, sale or purchase of goods or services;
  - geographic and customer market sharing.

  Vertical agreements are deemed to eliminate competition if they include any of the following arrangements:
  - retail price-fixing;
  - minimum retail price imposition;
  - allocation of exclusive commercial territories to selected distributors within a distribution network, excluding passive sales.

  However, restrictive agreements that "only" appreciably restrict competition can be justified on grounds of economic efficiency (*see Question 15*).

14. Do the regulations only apply to formal agreements or can they apply to informal practices?

The Competition Act can apply to informal practices (*see Question 13*).

15. Are there any exemptions? If so, please provide details.

Agreements that appreciably restrict competition are exempt if they can be justified on economic grounds. To qualify for this exemption they must both:

- Have no scope for the undertakings to be able to eliminate competition (that is, they must not be hard-core cartels).

- Be necessary to achieve one of the following:
  - reduce manufacturing and distribution costs;
  - improve the production and distribution of goods;
  - promote the transfer of technical or professional knowledge;
  - exploit resources more rationally.

The Competition Act includes provisions for the Federal Council and the FCC to specify, through legally binding regulations and non-binding communications, the conditions under which agreements can be deemed justifiable on grounds of economic efficiency. No such regulations from the Federal Council have yet been made.

The FCC has also begun issuing communications to provide guidance in specific areas (for example, an FCC communication on vertical agreements in the field of motor vehicle distribution).

16. Are there any exclusions from the law? If so, please provide details.

Agreements that do not appreciably affect competition are permitted (*see Question 13*). On 21 December 2005, the FCC issued a Notice on *de minimis* exemptions to restrictive agreements. Restrictive agreements generally fall within the *de minimis* Notice provided that the following three conditions are met:

- The restrictive agreement aims to improve competitiveness by:
  - realising scale economies;
  - contributing to innovation; or
  - creating sales incentives (such as agreements on research and development, production, distribution, and marketing).
- The restrictive agreement only has limited impact on the market (which is presumed when the aggregate market shares are below 10% for horizontal agreements and when each participant's market share is below 15% for vertical agreements).
- The restrictive agreement does not contain hard-core clauses (that is, clauses relating to price-fixing or market allocation) (*see Question 13*).

Restrictive agreements between small-sized undertakings would generally fall within the *de minimis* exception, provided that the agreement does not amount to a hard-core cartel. A small undertaking is defined as having annual worldwide turnover not exceeding CHF2 million (about US$1.6 million) and fewer than ten employees.

Mergers and concentrative joint venture agreements (including ancillary restraints) are excluded from the scope of the prohibition of restrictive agreements, even if they fall within the notification thresholds.

The provisions of the Competition Act do not apply to undertakings, which, by law, provide services of general economic interest or are granted special rights in relation to all matters strictly connected with the performance of specific tasks that have been assigned to them.

17. Please give a broad overview of formal notification requirements. In particular:

- **Is it necessary (or, if not necessary, possible/advisable) to notify to obtain an individual exemption or other clearance?**
- **Is it possible to obtain informal guidance before, or instead of, formal notification? If there is no formal notification procedure, can any type of informal guidance or opinion be obtained?**
- **Who should/can notify?**
- **To which authority should/can notification be made?**
- **What form of notification is used?**
- **Is there a filing fee? If so, how much?**

- **Notification.** There is no obligation to notify restrictive agreements. However, it is possible for potentially restrictive agreements to be notified before they enter into effect. If the FCC does not open an investigation within five months of the notification, no fine can be imposed.
- **Informal guidance/opinion.** The Secretariat can give informal guidance, which does not bind the FCC.
- **Responsibility for notification.** Each undertaking that is a party to, or later joins, a potentially restrictive agreement can file a notification.
- **Relevant authority.** Notification must be filed with the Secretariat (*Ordinance on Sanctions 2004*).
- **Form of notification.** In December 2004, the FCC issued a specific notification form. This must be filed in triplicate in one of the official Swiss languages. Supporting documents can be in English. Undertakings with a domicile abroad must use a Swiss address for notification.

  Notifications filed with foreign authorities can also be filed with the FCC, provided that they are in one of the official Swiss languages and contain the information requested by the notification form issued by the FCC. It is highly recommended that undertakings liaise with the Secretariat before filing notifications of this kind.
- **Filing fee.** Fees are charged on an hourly basis in the same way as for mergers (*see Question 3, Filing fee*).

18. Can investigations be started by:

- **The regulator on its own initiative?**
- **A third party by making a complaint?**

- **Regulators.** The Secretariat can begin a preliminary investigation on its own initiative, at the request of the undertakings concerned or as a result of a complaint filed by a third party. If signs of an unlawful restraint of competition exist, the Secretariat can open an investigation, with the consent of a member of the FCC's presiding body. The Secretariat must open an investigation in any event if asked to do so by the FCC or the Federal Department for Public Economy.
- **Third parties.** The Secretariat can begin preliminary investigations in response to third party complaints. There is no required form for complaints. Third parties cannot demand that the FCC initiate preliminary or regular investigations. They can only submit their views on the operation concerned once the FCC has decided to begin a regular investigation. This must be done within the time limit stipulated by the FCC. Participation in the investigation implies a right to consult files and to be heard (*see Question 19*).

19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

The following third parties can take part in an investigation concerning a restraint of competition:

- Competitors for which access to a market is impeded because of an infringement of the competition rules.
- Professional or economic bodies whose bye-laws authorise them to defend their members' economic interests.
- Organisations of national or regional importance that work for consumer protection under the terms of their bye-laws.

To join the proceedings they must apply within 30 calendar days of the announcement of the start of the investigation (*see Question 20*).

Third parties having applied within the time limit can give written opinions on the Secretariat's proposal. Participation in the investigation also implies a right to consult files and to be heard.

20. Please set out the stages of the investigation and timetable.

The procedure is subject to general rules set out by the Federal Act on Administrative Procedure 1968. If the FCC decides to open an investigation, it will publish a notice of this in the *Federal Bulletin* and the *Swiss Official Commercial Gazette*. The Secretariat collects information and organises the evidence-gathering process. The parties concerned, as well as third parties, must provide the FCC with the information and the documents it requests (*see Question 22*). The parties have the right to access the file and to be heard.

The participants in the investigation (members of the cartel or third parties) can give written opinions on the Secretariat's proposal (*see Question 19*). The FCC conducts hearings and instructs the Secretariat to take additional steps in view of the requirements of the investigation (*see also Question 18*).

The FCC closes proceedings by issuing a formal binding decision assessing the compatibility of the cartel with the competition rules and specifying the appropriate measures that should be taken to restore competition. The FCC can take any measures necessary to remove the unlawful effects of the cartel (for example, dissolving an association). Its decision must be notified to the parties concerned and may also be notified to third parties that have participated in the proceedings.

Whenever an agreement is prohibited by the FCC, the undertakings concerned can still apply to the Federal Council for an extraordinary authorisation. This will be granted only to protect major public interests.

21. What details (if any) of an investigation into a potentially restrictive agreement or practice are made public? Is certain information automatically kept confidential, and can the parties (or third parties) request that information is kept confidential?

Other than the notice of the opening of the investigation (*see Question 20*), no details of any potentially restrictive agreement or practice are made public during the investigation. In addition, business secrets are protected by the official confidentiality obligation.

22. Please summarise any powers that the relevant regulator has to investigate potentially restrictive agreements or practices.

The Secretariat collects information and organises the evidence-gathering process. The parties concerned, as well as third parties, must provide the FCC with the information and the documents it requests. The competition authorities can hear third parties as witnesses and require the parties to the investigation to make statements. House searches and seizures must be ordered by a member of the FCC's presiding body.

Undertakings that do not provide information or produce documents, or only partially comply with the requirements, can be fined up to CHF100,000 (about US$80,006). Failure to comply with a decision of the competition authorities concerning the obligation to provide information is also a criminal offence, and individuals, if they acted intentionally, can be required to pay a personal fine of up to CHF20,000 (about US$16,001).

The power to order house searches and seizures is one of the substantial amendments of the Competition Act of 1 April 2004. However, one issue that remains to be clarified is the protection of documents subject to professional privilege during house searches. Based on precedents in criminal proceedings, the Secretariat considers that privileged documents are excluded from seizure, provided that they relate to the current investigation.

23. Can the regulator accept binding or informal commitments from the parties to close the case without reaching an infringement decision? If so, please summarise the procedure and the circumstances in which commitments can be accepted.

If the Secretariat considers that a restraint of competition is unlawful, it can propose an amicable settlement to the undertakings involved suggesting ways of removing the restraint. The settlement must be made in writing and be approved by the FCC. Settlements are made instead of an infringement decision.

24. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice? In particular:

- **What orders can be made?**
- **What fines can be imposed on the participating companies? What are the consequences if they are not paid?**
- **Can personal liability, including fines, attach to individual directors or managers?**
- **Is it possible to obtain immunity/leniency from any fines?**
- **Can an entire agreement be declared void (that is, not only any restrictive provisions)?**

- **Orders.** In the case of prohibited restrictive agreements, the FCC can propose a settlement agreement to the undertakings concerned (*see Question 23*) or impose measures to remove the competitive restraint.
- **Fines.** If undertakings enter into a prohibited horizontal or vertical agreement which is deemed to eliminate competition (hard-core cartels) (*see Question 13*), they will be subject to a fine of up to 10% of total Swiss turnover for the last three business years, which is composed of the following items (*Ordinance on Sanctions*):
  - a basic amount of up to 10% of the Swiss turnover achieved by the undertakings on the relevant geographic and product markets, during the three preceding business years;
  - an amount contingent on the duration of the restrictive agreement or practice:
    - a duration of between one and five years will increase the basic amount by up to 50%;
    - a duration of more than five years may increase the basic amount by up to 10% per additional year;
  - an amount contingent on aggravating factors (such as extraordinarily high cartel profits) or extenuating circumstances (such as a passive role played by the undertaking or the immediate removal of the unlawful restriction following the first intervention of the Secretariat).

  No fines can be imposed if the participating undertakings set aside the restriction on competition more than five years before the Secretariat started an investigation.

  Undertakings that participate in a restrictive agreement that is not hard-core do not have to pay a fine for the unlawful agreement itself. However, they can be fined for failing to comply with previous administrative decisions or orders issued by the FCC (for example, by violating a previous decision or breaching an amicable settlement approved by the FCC). Failure to pay fines does not result in any additional administrative sanction.
- **Personal liability.** Infringements of a previous decision of the FCC or of an amicable settlement approved by the FCC can also amount to criminal offences. An additional fine can be imposed on the individuals responsible for the infringements or violations of up to CHF100,000 (about US$81,041).
- **Immunity/leniency.** An undertaking that participates in a hard-core cartel can avoid paying a fine, either wholly or partially, under the FCC's leniency programme. In April 2005, the FCC issued an application form for the leniency programme. For a full waiver, the undertaking must have been the first to submit sufficient evidence enabling the FCC to initiate a regular investigation or to discover a hard-core cartel. The undertaking that promoted the cartel cannot qualify for a full waiver.

  A partial reduction in the fine may be available if the undertaking spontaneously participates in the investigation conducted by the Secretariat and ceases the unlawful restriction on competition. The fine can be reduced by up to 50% depending on the contribution of the undertaking to the success of the investigation. If the undertaking provides information on other (still hidden) prohibited cartels, the fine may be reduced by up to 80%.

  For further information relating to leniency in Switzerland, please see PLC *Cross-border Competition Handbook 2006/07 Volume 2: Leniency* at *www.practicallaw.com/leniencyhandbook*.
- **Impact on agreements.** Unlawful agreements are, in principle, entirely null and void. However, if only specific parts of the agreement violate the Competition Act then only those parts are null and void, unless it can be presumed that the agreement would not have been concluded without the infringing sections (*Code of Obligations*).

25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, please summarise any special procedures or rules that apply. Are class actions possible?

Third parties that have suffered a loss as a result of an unlawful agreement can request damages and repayment of illegally earned profits before the civil courts (*Code of Obligations and provisions on conducting business without a mandate*). Class actions do not exist in Switzerland.

26. Is there a right of appeal against any decision of the regulator and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only the parties to the agreement or practice?

All decisions made by the Secretariat or the FCC are subject to judicial review by the Appeal Commission up until 31 December 2006 and by the FAC from 1 January 2007 onwards. Final decisions of the Secretariat or the FCC (for example, a fine or an amicable settlement) can be appealed within 30 days of receipt. Further appeals can be made to the Federal Supreme Court. An appeal can be brought by any person affected by a restrictive agreement or practice.

27. Are there any differences between the enforcement of Article 81 of the EC Treaty by the national competition authority and courts and the enforcement of your jurisdiction's national competition laws?

Not applicable.

MONOPOLIES AND ABUSE OF MARKET POWER

28. Are monopolies and abuses of market power regulated under civil and/or criminal law? If so, please give a broad overview of the substantive provisions and regulatory authority.

Monopolies and abuses of market power are regulated by the Competition Act, which is administered by the FCC and the Federal Council.

29. How is dominance/market power determined?

A dominant position is defined as a position of economic strength that enables an undertaking to behave, to an appreciable extent, independently from the other market operators (competitors, suppliers and customers). A dominant position can be held by one or more companies and by either a seller or a purchaser. Significant factors for determining whether an undertaking enjoys a dominant position in a specific market include:

- Its market share. There are no guideline indications of what levels of market share amount to dominance; this will be decided in each individual case.
- Barriers to entering or leaving the market, including costs (sunk costs).
- The number, quality and position of competitors.
- The structure of the market.

30. Are there any broad categories of behaviour that may constitute abusive conduct?

Abuse of a dominant position is prohibited (*Competition Act*). An abuse is found whenever an undertaking takes, without objective justification (that is, legitimate business reasons), steps that have the effect of restricting competition or creating disadvantages for trading parties. This can, in particular, consist of:

- Refusing to trade (for example, refusing to supply a trading party).
- Discriminating between equivalent trading parties in relation to prices and other trading conditions (for example, granting annual premiums and loyalty discounts).
- Imposing unfair purchase or selling prices or other unfair trading conditions.
- Practising predatory pricing or other predatory trading conditions directed against a specific competitor (for example, unjustifiably low prices offered to the competitor's customers).
- Limiting production, markets or technical developments.
- Making the conclusion of contracts subject to the other party's acceptance of additional obligations (tying).

31. Are there any exclusions or exemptions?

The Competition Act does not apply to the following:

- Situations involving goods or services in specific markets which are regulated by other laws.
- Undertakings that are specially regulated in the public interest, such as those providing water, gas or electricity.

Exceptionally, the Federal Council can authorise an abuse of dominant position provided that such anti-competitive behaviour is necessary to protect major public interests.

32. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or guidance (formal or informal) from the regulator? If so, please set out briefly the procedure.

Potential abuses of a dominant position can be notified before they enter into effect.

The notification must provide, among other things, the following details:

- The turnover achieved by the undertaking(s) holding a dominant position.
- The overall turnover in the relevant market.

THE REGULATORY AUTHORITIES

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Outline structure. The FCC has 13 members who are non-permanent, independent experts. Two vice-presidents assist the President. The FCC is divided into three chambers:

- Industry and production.
- Services.
- Infrastructure.

Responsibilities. The FCC is the authority with primary responsibility for enforcing Swiss competition rules. It has decision-making powers and jurisdiction over any matter that is not being dealt with by another authority. Its duties include:

- Approving settlement agreements.
- Imposing penalties.
- Receiving notification of concentrations.
- Issuing the necessary decisions.
- Serving notices.
- Giving opinions and making recommendations to the political authorities.

The FCC is independent from the Federal Administration.

Procedure for obtaining documents. Rulings are published in the *Competition Law and Policy Review* (only available in French, German and Italian).

The FCC's Secretariat

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Outline structure. The Director is appointed by the Federal Council. The Secretariat is divided into three departments, each headed by a deputy director:

- Industry and production.
- Services.
- Infrastructure.

Responsibilities. The Secretariat is not an independent authority but is subordinate to the FCC. However, it has significant powers, including jurisdiction in preliminary and regular investigation proceedings. It also:

- Prepares the cases that fall within the jurisdiction of the FCC.

- The respective position of competitors.
- The undertakings affected by the potential restriction.
- Any suppliers that achieve 20% of their turnover from sales to the dominant undertaking.
- Whether the elimination of parallel imports is likely.

The form of the notification is the same as for notifying a restrictive agreement (*see Question 17*). In addition, undertakings holding a dominant position can obtain informal guidance from the Secretariat.

33. Where different than for restrictive agreements and practices, explain how investigations are started, the procedures that apply, the rights of third parties, what details are made public and whether the regulator can accept commitments.

The rules governing abuse of a dominant position are the same as those applying to restrictive agreements (*see Questions 13 to 27*).

34. Please summarise the regulator's powers of investigation.

The rules governing abuse of a dominant position are the same as those applying to restrictive agreements (*see Questions 13 to 27 and, in particular, Question 22*).

The regular examination by the FCC and the extraordinary examination by the Federal Council (*see Question 31*) involve a two-tier test:

- The FCC assesses whether competition is restricted as a result of the abuse.
- The Federal Council assesses whether any restriction on competition can be justified on the basis of general economic or social grounds.

- Makes decisions on procedural questions.
- Submits proposals to the FCC.
- Enforces the FCC's decisions.

The Secretariat deals directly with the undertakings involved and third parties, and can propose settlement agreements.

Procedure for obtaining documents. Practical information and advice can be obtained from the Secretariat. Information relating to a pending case cannot be obtained by third parties, unless it has been published by the Secretariat.

Federal Administration Court (FAC)

Head. Christoph Bandli (President)

Contact details. CH- 3000 Bern
Switzerland
(The FAC is set to relocate to its permanent seat in St. Gallen once the construction of the court building is complete.)
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W *www.bj.admin.ch/bvger/de/home.html*

Outline structure. The FAC has one president, one vice-president and up to 70 judges.

Responsibilities. From 1 January 2007 onwards, decisions taken by the Secretariat or the FCC can be referred to the FAC. The FAC is the first level of appeal for questions of administrative law. It replaces the Appeal Commission for Competition Matters.

Procedure for obtaining documents. Rulings are published in the *Competition Law and Policy Review*.

Federal Supreme Court

The Federal Supreme Court is the supreme judicial authority. The FAC's decisions can be appealed to the Federal Supreme Court under the administrative law procedure.

Federal Council

The Federal Council is the chief executive authority. It has a specific duty to grant exceptional clearances based on overriding public interests. These clearances, which depend above all on political considerations, permit restrictions on competition (including agreements, abuses of a dominant position or concentrations) that have been found to be unlawful by the FCC.

Other bodies

The ordinary courts can try actions based on the civil law provisions of the Competition Act. Any undertaking impeded from entering or competing in the market by an unlawful restraint of competition can bring a civil action for the removal of the restriction (by asking the courts to rule that the agreement is null and void in whole or in part), damages and repayment of illegally earned profits. In certain circumstances, the courts can order interim measures. The courts' decisions can be appealed to the Federal Supreme Court.

The Competition Act requires the civil courts to refer disputed restrictions on competition to the FCC for its opinion on their legality.

35. What are the penalties for abuse of market power and what orders can the regulator make?

The rules on fines and penalties governing abuse of a dominant position are the same as those applying to prohibited hard-core cartels (*see Question 24, Orders* and *Fines*).

36. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, please summarise any special procedures or rules that apply. Are class actions possible?

Undertakings that have suffered a loss as a result of an abuse of a dominant position can request damages and repayment of illegally earned profits before civil courts (*Code of Obligations and provisions on conducting business without a mandate*). Class actions do not exist in Switzerland.

37. Are they any differences between the enforcement of Article 82 of the EC Treaty by the national competition authority and courts and the enforcement of your jurisdiction's national competition laws?

Not applicable.

JOINT VENTURES

38. Please explain how joint ventures are analysed under competition law.

Concentrative joint ventures are governed by the same provisions as those applying to concentrations. A concentrative joint venture occurs in the following two situations:

- When an existing joint venture performing all of the functions of an autonomous entity on a lasting basis is acquired.

- When a joint venture performing all the functions of an autonomous entity on a lasting basis is formed and the operations of at least one of the founding companies is transferred to the joint venture.

Other joint ventures are governed by the general rules applying to restrictive agreements.

INTER-AGENCY CO-OPERATION

39. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

No formal co-operation agreements have been entered into with foreign anti-trust authorities. However, co-operation takes place on an informal basis with the approval of the parties involved. The Secretariat has started to ask regularly for permission to contact the European Commission in cases where there is a parallel merger filing with the EU regulator.

PROPOSALS FOR REFORM

40. Please summarise any proposals for reform.

Following the latest amendments to the Competition Act, brought into force on 1 April 2004, there are no new proposals for reform.