Competition law in Switzerland: overview

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A Q&A guide to competition law in Switzerland.

The Q&A gives a high level overview of merger control, restrictive agreements and practices, monopolies and abuse of market power, and joint ventures. In particular, it covers relevant triggering events and thresholds, notification requirements, procedures and timetables, third party claims, exclusions and exemptions, penalties for breach, and proposals for reform.

To compare answers across multiple jurisdictions visit the Competition Country Q&A tool.

This Q&A is part of the PLC multi-jurisdictional guide to competition and cartel leniency. For a full list of jurisdictional Q&As visit www.practicallaw.com/competition-mjg.

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Merger control

1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction?

Regulatory framework

Mergers and acquisitions are regulated by the:

- Cartels and Other Restraints of Competition Act 1995 (Competition Act).
- 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).

Regulatory authority

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).

Triggering events/thresholds

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 (see below, Thresholds).
A concentration is either (*Competition Act*):

- The merger of two or more previously independent undertakings (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 target's strategic business decisions (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 or the aggregate turnover of the undertakings within Switzerland amounted to at least CHF500 million.

- The aggregate turnover in Switzerland by each of at least two of the undertakings concerned amounted to at least CHF100 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*).

A planned concentration must be notified even if it does not reach the above thresholds, if both:

- A party already enjoys a dominant position in the Swiss market (which has been ascertained in a Swiss competition authority decision).

- The planned concentration relates to either:
  - the market in which the party holds the dominant position;
  - a neighbouring (upstream or downstream) market.

**Notification**

**3. What are the notification requirements for mergers?**

**Mandatory or voluntary**

Notification is mandatory if either:

- A proposed concentration meets the thresholds set out by the Competition Act.

- One of the undertakings concerned already enjoys a dominant position in a market affected by the concentration or a neighbouring market, as ascertained in a legally enforceable FCC decision (*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 for the investigation (apart from the preliminary investigation) are charged on an hourly basis ranging from CHF100 to CHF400, 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 in lieu of the hourly fees. The fees must be paid by the undertaking(s) responsible for filing the notification (see above, Responsibility for notification).

Obligation to suspend

The FCC has one month to decide whether to open a regular investigation. 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 the FCC opens a regular investigation and makes no decision, or clears the concentration within four months of its opening, the undertakings can freely implement the concentration provided they are not responsible for the FCC being unable to make a decision in time.

See Question 4.

Procedure and timetable

4. What are the applicable procedures 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 the Swiss 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 the receipt of the (complete) notification. The Secretariat must decide, within one month, whether the concentration might create or strengthen a dominant position. If there are indications that it might, the FCC begins a regular investigation. In addition to notifying the affected parties of 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.

If the affected parties do not receive notification of the FCC opening a regular investigation within this one-month period, the concentration is automatically cleared (without requiring formal authorisation). The FCC applies a two-tier test to its investigation (see Question 7). It must make a final decision 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 or obligations (see Question 8).
- Prohibit the merger.

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

### Publicity and confidentiality

**5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?**

#### Publicity

Publicity is given at two stages. 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 also specifies the period during which third parties can comment on the proposed merger. No other details are made public during the investigation.

On termination of the proceedings, the Secretariat must publish the FCC's decision in the Federal Bulletin and the Swiss Official Commercial Gazette, which includes the following information about the undertakings involved:

- Their names.
- Their domicile.
Procedural stage

Information is released on opening and termination of the proceedings (see above, Publicity).

Automatic confidentiality

The FCC’s publications cannot reveal any trade or business secrets (see Question 21). If the publication or other disclosure of information to be provided by a participating undertaking would harm that undertaking's interest, the information should be submitted separately, with the wording “business secrets.” In addition, during the investigative proceedings trade secrets are protected by the official confidentiality obligation. Information collected by the competition authorities in performance of their duties can only be used for the purposes of the investigation.

Confidentiality on request

The parties cannot insist that certain information be kept confidential. However, in practice, the FCC usually considers confidentiality requests.

Rights of third parties

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations

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 that the FCC stipulates.

Document access

Competitors and third parties are not parties to the examination proceedings and so have no access to related documents.

Be heard

As competitors and third parties are not parties to the examination proceedings, they have no right to be heard.

Substantive test

7. What is the substantive test?

The FCC examines whether a concentration:

- Creates or strengthens a dominant position that eliminates or significantly restricts competition.
- Improves competitiveness in other markets to an extent that exceeds the drawbacks of the dominant position.
The FCC usually automatically clears a concentration at the end of a preliminary investigation provided that both:

- No single undertaking involved in the concentration has a market share of over 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.

**Remedies, penalties and appeal**

**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, but the ultimate decision lies with 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 failing to comply with the merger control rules?**

**Failure to notify correctly**

Failure to notify a concentration or notification after the concentration has completed is a serious breach of law, which can lead to administrative fines (for the undertakings) of up to CHF1 million. If the notification is defective (that is, based on inaccurate information), the FCC can revoke its authorisation.

**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 (administrative sanction) and can 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, the undertakings can 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 on the face of it the concentration represents a threat to competition.

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. If found guilty, individuals can be personally fined up to CHF20,000.

If fines are not paid, the FCC can convert them into arrest, 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 after completion. However, managers of undertakings have not been fined in practice so far.

10. Is there a right of appeal against any decision? 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?

Rights of appeal and procedure

All decisions made by the Secretariat or the FCC are subject to judicial review by the Federal Administrative Court (FAC). A final FCC decision (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 buyer and the target, or the joint venture and its controlling entities.

Third party rights of appeal

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.

Automatic clearance of restrictive provisions

11. If a merger is cleared, are any restrictive provisions in the agreements 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 (such as non-compete obligations imposed on the seller in a takeover), are subject to the FCC’s investigation. 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).
Regulation of specific industries

12. What industries (if any) are 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, Thresholds) is calculated according to the total value of gross annual premiums.

- **Banks or other financial intermediaries.** The threshold value (see Question 2, Thresholds) is calculated according to the total value of gross annual profits. When mergers involve banks and protecting creditors’ interests is crucial, creditors’ interests can be given priority (Competition Act). In this case, the FCC only gives its opinion and the Swiss Financial Market Supervisory Authority (FINMA) makes the clearance decision.

Restrictive agreements and practices

Scope of rules

13. Are restrictive agreements and practices regulated? If so, what are 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.

Agreements are only prohibited if they appreciably restrict or eliminate competition. This is assessed as follows:

- **Appreciable restriction of competition.** Agreements (horizontal or vertical) that appreciably restrict competition are prohibited, unless they are justified on grounds of economic efficiency (see Question 15).

  In particular, according to the (new) Communication of the FCC on Vertical Restraints of 28 June 2010 (Communication on Vertical Restraints), which entered into force on 1 August 2010, vertical agreements (arrangements between undertakings at different market levels) are assumed not to have an appreciable effect on the market if none of the undertakings participating in the agreement has a market share in excess of 15% (de minimis clause), unless they include any of the following arrangements (Communication on Vertical Restraints):

  - 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;
  - restrictions preventing suppliers from selling components or spare parts to customers (end-users, repairers and so on) other than the distributors designated in the agreement.

  The following types of restriction are not considered to represent appreciable restrictions of competition (Communication on Vertical Restraints):

  - restricting active sales into exclusive territories, or to customer groups reserved to the supplier or allocated by the supplier to another distributor, provided that passive sales are not restricted (sales through websites...
are considered to be passive sales, unless the content of the relevant website is addressed to clients outside the distributor's exclusive territory);

- restricting direct sales to end-users by wholesalers;
- restricting sales to unauthorised distributors by the members of a selective distribution system;
- restricting the buyer's ability to sell components supplied for the purpose of incorporation to customers who could use them to manufacture rival products;
- post-contractual non-compete obligations relating to goods or services that:
  - compete with the contract goods or services;
  - are limited to the premises and land from which the buyer has operated during the contract period;
  - are indispensable to protect know-how transferred by the supplier to the buyer; and
  - do not continue for more than one year after termination of the vertical agreement.

**Elimination of competition.** Agreements that eliminate competition (hard-core cartels) are prohibited and cannot be justified on grounds of economic efficiency.

Horizontal agreements (arrangements between undertakings at the same market level) 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);
- 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 distributors within a distribution network, excluding passive sales.

Price recommendations are presumed to eliminate competition or lead to a "qualitatively serious" restriction if, as a result of pressure or incentives, they amount to a fixed or minimum sales price with regard to the pricing of the buyer (*Communication on Vertical Restraints*). This assessment criteria is provided together with a catalogue of circumstances which can lead the authority to initiate an investigation:

- communication of the price recommendation was not open to the public at large (only to resellers or distributors);
- indication of the price recommendation on the products, in catalogues and so on, unless expressly stated to be non-binding;
a price level significantly higher in Switzerland than in neighbouring countries; and

actual adherence to the price recommendations by "a significant part of the resellers or distributors".

The legal presumption of elimination of competition by a (hard-core) vertical agreement is subject to an overall assessment of the relevant market. This presumption can be rebutted by demonstrating the existence of either sufficient intra-brand competition or sufficient inter-brand competition (or sufficient competition due to a combination of both). (By contrast, under the old Communication on Vertical Restraints, the FCC considered that the sole fact that inter-brand competition existed was not sufficient to rebut the presumption.)

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). Agreements that eliminate competition (hard-core cartels) are prohibited and cannot be justified on grounds of economic efficiency (see Question 13).

Exemptions

15. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

Agreements that appreciably restrict competition (see Question 13) are exempt if they can be justified on economic grounds. To qualify for this exemption an agreement must both:

- Not possibly eliminate competition (that is, it must not constitute a hard-core cartel).
- Be necessary to achieve one of the following:
  - reduction of manufacturing and distribution costs;
  - improvement of the production and distribution of goods;
  - promotion of the transfer of technical or professional knowledge;
  - more rational exploitation of resources.

In particular, vertical agreements that appreciably restrict competition are exempt if they can be justified on the following grounds (Communication on Vertical Restraints):

- Protection for a limited duration of investments aimed at opening up new geographical or product markets.
- Ensuring the uniformity and quality of the contractual products.
- Protection of contract-specific investments that cannot be used outside the business relationship or can only be used at a significant loss.
- Avoiding inefficiently low levels of sales promotion measures.
- Avoiding a double price mark-up.
Encouraging the transfer of essential know-how.

Securing financial commitments that are not provided by the capital market.

For market shares below 30%, there is the possibility of a general justification for distribution agreements without an individual investigation. The market share threshold for this general justification has been extended in the (new) Communication on Vertical Restraints (see Question 13) to the buyer's market share. Therefore, both the supplier's market share of the market in which he sells the contract goods and the buyer's market share of the market in which he purchases the contract goods are relevant. If each of these market shares does not exceed 30%, all agreements (except qualitatively serious restrictions) are considered to be justified without any further investigation.

The Competition Act includes provisions for the Federal Council (the chief executive authority) 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. The Federal Council has not yet made any such regulations. By contrast, the FCC has published a Communication on Vertical Restraints (see Question 13). The FCC has also issued communications to provide guidance in specific areas (for example, an FCC communication on vertical agreements in the field of motor vehicle distribution).

**Exclusions and statutes of limitation**

16. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

**Exclusions**

Agreements that do not appreciably affect competition are permitted (see Question 13). On 19 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 economies of scale;
  - 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 (see Question 13).

Restrictive agreements between small-sized undertakings 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 both:

- An annual worldwide turnover not exceeding CHF2 million.
- Fewer than ten employees.
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.

**Statutes of limitation**

No fines can be imposed (see Question 24) if the participating undertakings set aside the restrictive agreement more than five years before the Secretariat started a (regular) investigation (Competition Act).

**Notification**

17. What are the notification requirements for restrictive agreements and practices?

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 object by opening a (preliminary or regular) investigation within five months of the notification, no fine can be imposed (objection procedure).

**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.

**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 Secretariat, 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).

**Investigations**

18. Who can start an investigation into a restrictive agreement or practice?
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 a regular investigation, with the consent of a member of the FCC's presiding body. The Secretariat must open a regular investigation in any event if the FCC or the Federal Department for Public Economy asks it to do so.

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 the FCC stipulates. 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?

Representations

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 competition rules.
- Professional or economic bodies that have bye-laws which 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 that have applied within the time limit (see Question 18) can give written opinions on the Secretariat's proposal.

Document access

Participation in the investigation also implies a right to consult files and to be heard.

Be heard

See above, Document access.

20. What are 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 a regular investigation, it publishes a notice of this in the Federal Bulletin and the Swiss Official Commercial Gazette. The Secretariat collects information (for example, by sending questionnaires to the undertakings concerned and to other market participants) 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.

Based on its investigative measures, the Secretariat issues a draft FCC decision. This draft is submitted to the parties concerned for comment. Both the draft decision and the parties' comments are then submitted to the FCC. Before concluding the investigation, the FCC can:

- Conduct hearings with the parties to the investigation and instruct the Secretariat to take additional steps in view of the requirements of the investigation.
- Require the amendment of reasoning on which the draft decision is based. If the amendment relates to essential findings, an amended draft decision must be submitted to the parties for comment.

The FCC closes proceedings either by:

- An amicable settlement, which can be combined with a fine for past infringements (see Question 23).
- 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 cartel's unlawful effects (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 the FCC prohibits an agreement, the undertakings concerned can still apply to the Federal Council for an extraordinary authorisation. This is granted only to protect major public interests.

### Publicity and confidentiality

21. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

#### Publicity

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.

#### Automatic confidentiality

The FCC's publications cannot reveal any trade or business secrets. In addition, the FCC must ensure that the business secrets of a party to the investigation are not made available to the other parties (for example, a party that files a request to consult the file). On 30 April 2008, the FCC Secretariat issued an explanatory note on business secrets, according to which business secrets relate to information which:

- Is known only by the person who provided the information or among persons within the circles that normally deal with the kind of information in question.
- Has been subject to steps by the person lawfully in control of the information to keep it secret (and the FCC has been notified of such steps).
Has commercial value for the undertaking concerned and only relates to one undertaking (to the exclusion of a group of undertakings).

In addition, business secrets are protected by the official confidentiality obligation.

**Confidentiality on request**

The parties cannot request the confidentiality of information which is not a business secret.

22. **What are the powers (if any) 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. 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.

The power to order house searches and seizures is one of the substantial amendments of the Competition Act of 1 April 2004. Under this investigative power, the Secretariat conducted its first dawn raids in 2006 and 2007.

Pursuant to the Secretariat's Notice on Dawn Raids, amended on 6 April 2011, external counsel's correspondence is privileged, irrespective of its location (that is in the counsel's or the client's premises) and the date of its production (that is before or after the launch of the investigation). Companies whose premises are searched, or their external lawyer, can request that seized documents or electronic data be sealed if this material is privileged or beyond the investigation's scope. These rules only apply to competition investigations by the FCC or its Secretariat. They do not apply with respect to any dispute or litigation before Swiss civil courts (inside or outside the field of competition law).

In-house lawyers are not subject to lawyers' professional secrecy so their documents are not privileged.

**Settlements**

23. **Can the regulator reach settlements with the parties without reaching an infringement decision? If so, what are the circumstances in which settlements can be reached and the applicable procedure?**

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. Generally, settlements are made instead of an infringement decision. However, in recent cases, the FCC found that reaching an amicable settlement does not rule out fines in respect of infringements that took place before the amicable settlement's conclusion. According to the Federal Administrative Court, the undertaking that enters into an amicable settlement impliedly acknowledges its guilt.

**Penalties and enforcement**

24. **What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?**
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 (for example, an order prohibiting specific agreements or conduct, or an order to enter into agreements that are adequate to the market situation with the party restrained from competition).

Fines

Fines are regulated by the Ordinance on Sanctions 2004. If undertakings enter into a prohibited horizontal or vertical agreement which is deemed to eliminate competition (hard-core cartels) (see Question 13), they are subject to a fine of up to 10% of their total Swiss turnover for the last three business years, which is composed of the following items:

- 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 increases 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, obstruction of investigations or uncooperative behaviour during the investigation) 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).

From a formal viewpoint, fines for infringement of the prohibition of cartels are considered to be administrative sanctions (Competition Act). Recently, however, the Federal Supreme Court classified fines with effects similar to those of criminal law as being criminal in nature. In a 2009 case, the FCC found that undertakings that participate in a hard-core agreement (such as price-fixing) are subject to a fine even if the agreement does not eliminate competition but only appreciably restricts competition (see Question 13). This is unless the agreement is justified on grounds of economic efficiency (see Question 15). The FCC recently confirmed this view in its (new) Communication on Vertical Restraints.

Undertakings 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 sanction.

Personal liability

Infringements of a previous FCC decision or of an amicable settlement approved by the FCC can also amount to criminal offences. An additional fine of up to CHF100,000 can be imposed on the individuals responsible for such infringements. Imprisonment cannot be awarded for such infringements.

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 instigated the cartel or was the main party in the cartel activity 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 can be reduced by up to 80%.

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).

Third party damages claims and appeals

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

Third party damages

Third parties that are hindered by an unlawful restraint of competition from entering or competing in a market can request before the civil courts either or both of the following:

- The elimination of, or desistance from, the hindrance.
- Damages and repayment of illegally earned profits.

Special procedures/rules

Third party claims for losses resulting from an unlawful restraint of competition are governed by the general provisions of the Code of Obligations, particularly on torts and conducting business without a mandate.

Third parties can also request the elimination of, or desistance from, a hindrance, and damages and repayment of illegally earned profits, if they are hindered by a lawful restraint of competition to a greater extent than is necessary for the implementation of that restraint.

Class actions

Class actions do not exist in Switzerland.

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

Rights of appeal and procedure

All decisions made by the Secretariat or the FCC are subject to judicial review by the FAC. 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.

The Federal Criminal Court decides whether the seals must be lifted after the undertaking's opposition to an investigative measure (see Question 22). This decision is subject to an appeal before the Federal Supreme Court.
Third party rights of appeal

A right of appeal against a decision of the Secretariat or the FCC is granted to anyone who has:

- Participated, or has been refused the opportunity to participate, in the proceedings before the Secretariat or the FCC (see Question 19).
- Been specifically affected by the contested decision.
- An interest that is worthy of protection through the revocation or amendment of the contested decision.

Monopolies and abuses of market power

Scope of rules

27. Are monopolies and abuses of market power regulated under administrative and/or criminal law? If so, what are 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.

28. 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 participants in the market. A dominant position can be held by one or more companies and by either a buyer or seller. 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 is decided in each individual case.
- Barriers to entering or leaving the market (including sunk costs).
- The number, quality and position of competitors.
- The structure of the market.

Certain scholars interpret the definition of dominant undertakings broadly, in that dependence of one undertaking on another can lead to market dominance irrespective of overall dominance in the relevant product market (relative market dominance). In a case involving Switzerland's second biggest retailer, the FCC held that a supplier might be economically dependent on a retailer (dominant buyer) when the following two conditions are met:

- There is no other client of a comparable size for the supplier, and the additional demand from other clients can only marginally compensate for losing that client, not allowing the supplier to cover its fixed costs. The following factors are used to determine whether this condition is met:
  - the share of the supplier's business with the buyer;
  - the bargaining power of the supplier and its market position; and
  - whether the supplier has alternatives clients.
Production factors (equipment and personnel) and, where appropriate, research and development of the supplier, are wholly or partially specialised in the manufacture of goods or services for the buyer and cannot be used or adapted to produce other goods or services to an economically acceptable cost. To determine whether this condition is met, the following factors are considered:

- the recent history of the supplier’s undertaking, including the date and extent of its investments;
- the contracts that the supplier has entered into with its distributors; and
- the significance of switching costs.

The Swiss Supreme Court has not had the opportunity to decide on these issues.

The FCC also applies the concept of collective dominance. Undertakings are considered collectively dominant if there is an expectation that the co-ordination between them will last, that is, that there is sufficient incentive to co-ordinate behaviour to deter the members of the oligopoly from deviating from the co-ordinated behaviour.

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

Abuse of a dominant position is prohibited (Competition Act). An abuse exists 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. In particular, this can 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 sale 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).

### Exemptions and exclusions

### 30. Are there any exemptions or exclusions?

The Competition Act does not apply to:

- Situations involving goods or services in specific markets that are regulated by other laws.
- Markets that are specially regulated in the public interest, such as (part of) the electricity market.

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

31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

Potential abuses of a dominant position can be notified before they enter into effect (objection procedure). 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 respective position of competitors.
- The undertakings affected by the potential restriction.
- Any suppliers that achieve more than 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, Notification). In addition, undertakings holding a dominant position can obtain informal guidance from the Secretariat.

**Investigations**

32. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

The rules governing abuse of a dominant position are the same as those that apply to restrictive agreements (see Questions 13 to 26).

33. What are the regulator’s powers of investigation?

The rules regulating abuse of a dominant position are the same as those applying to restrictive agreements (see Questions 13 to 26, particularly Question 22). The FCC assesses whether competition is restricted as a result of the abuse, while the Federal Council assesses whether any restriction on competition can be justified on the basis of general economic or social grounds (see Question 30).

**Penalties and enforcement**

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

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

**Third party damages claims**

35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are class actions possible?
The rules and procedures applicable to third parties' claims for losses and other rights as a result of abuse of market power are the same as those that apply to restrictive agreements (see Question 25).

**EU law**

### 36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

**Joint ventures**

### 37. How are joint ventures analysed under competition law?

Concentrative joint ventures are governed by the same provisions as those applying to concentrations. A concentrative joint venture occurs when either:

- An existing joint venture is acquired that performs all of the functions of an autonomous entity on a lasting basis.
- A joint venture is formed that performs all the functions of an autonomous entity on a lasting basis, and the operations of at least one of the founding companies are transferred to the joint venture.

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

**Inter-agency co-operation**

### 38. 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)?

The FCC can co-operate with the EU authorities under Article 11 of the Treaty on Air Transport between Switzerland and the EU. Recently, Switzerland and Japan concluded a free trade agreement which contains basic provisions on co-operation between competition authorities of both countries. Apart from this, 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 asks regularly for permission to contact the European Commission in cases where there is a parallel merger filing with the EU regulator. However in 2011, Switzerland and the EU started negotiating a bilateral agreement on co-operation and exchange of information between Swiss and European competition authorities. On 1 June 2012, after ten rounds of negotiations, the EU Commission published its proposal for an agreement between the EU and Switzerland concerning co-operation on the application of their competition laws (*COM(2012) 245 final*). The co-operation agreement still needs to be adopted by the EU Council, the EU Parliament and approved by the (Swiss) Federal Parliament. Once in force, the co-operation agreement will, among other things, allow the transmission of information and documents between the FCC and the EU Commission even if the concerned company does not consent to the transmission. The company will have no right to appeal, even outside of an in-depth investigation.

**Proposals for reform**

### 39. Are there any proposals for reform of competition law?

http://crossborder.practicallaw.com/5-500-8809?q=*&qp=&qo=&qe
On 22 February 2012, the Federal Council submitted to the Federal Parliament a draft bill to amend the Competition Act. The draft bill proposes several fundamental changes and innovations:

- **Organisational structure.** One of the most important proposals is the creation of an independent Federal Competition Court that will have decision-making powers. A newly created Competition Authority (basically made up of the current Secretariat) will be in charge of conducting investigations. The aim is to strengthen the rule of law by providing for a clear separation between investigating and prosecuting functions, and decision-making functions.

- **Control of concentrations.** The draft bill suggests replacing the current substantive test (see Question 7) with a significant impediment to effective competition (SIEC) test analogous to EU law.

- **Agreements.** To improve the treatment of agreements, the draft bill proposes to abandon the legal presumption of illicit practice for hard-core agreements (see Question 13). For such agreements, the draft bill suggests the introduction of a per se prohibition, unless they can be justified on grounds of economic efficiency. Under the new regime, the FCC would no longer be required to prove an appreciable adverse effect on competition for the hard-core agreements. The Competition Act also retains the possibility of imposing direct penalties on the parties to such agreements.

- **Objection procedure.** To improve the legal certainty which the objection procedure (see Questions 17 and 31) is supposed to provide to undertakings in the case of questionable behaviour, the draft bill suggests that only the opening of a regular (but not a preliminary) investigation or the opening of a preliminary investigation followed by a regular investigation should be able to set aside the protection from fines. The bill further provides that such opening must occur within two months as of the notification.

- **Private enforcement.** The draft bill provides for minor amendments. In particular, the right to sue (see Questions 25 and 35) should be extended to persons threatened or hurt in their economic interests by an unlawful restraint of competition (including consumers and public entities). However, the idea of introducing class actions has been rejected to avoid an excessive litigation culture. In addition, the bill provides for the suspension of the statute of limitations for civil actions during an investigation of an alleged anticompetitive practice by competition authorities.

- **Sanctions.** The draft bill also provides for a potential reduction of fines imposed on undertakings if the undertaking can demonstrate that it has implemented an effective competition compliance programme.

In addition to the above amendment proposals, the Federal Parliament will have to deal with proposals from its own ranks.

### Online resources

**Federal Competition Commission (FCC)**

W [www.weko.admin.ch](http://www.weko.admin.ch)

**Description.** This is the official website of the FCC and its Secretariat. It contains a copy of the press releases and latest decisions of the FCC and its Secretariat (that is before publication in the *Competition Law and Policy Review*), a copy of the main texts of the competition regulation framework, a copy of the rulings published in the *Competition Law and Policy Review*, some information on the Form for the Notification of Concentration of Undertakings and on the Leniency application form as well as a description of the organisation and details of the FCC and its Secretariat. The website is in German, French and Italian. It also provides some translations into the English language, which are not binding.
The regulatory authorities

Federal Competition Commission (FCC)

Head. Professor Vincent Martenet (President)

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F +41 31 322 20 53
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Outline structure. The FCC has 12 members who are non-permanent, mainly independent experts. Two Vice-Presidents assist the President.

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).

FCC’s Secretariat

Head. Rafael Corazza (Director)

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

- Construction.
- Services.
- Infrastructure.
- Product markets.

The work of the Secretariat in the fields of law and economics, Federal Act on Internal Market, international affairs and communication is supported by competence centres.

**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 FCC's jurisdiction.
- 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.

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**Federal Administrative Court (FAC)**

**Head.** Markus Metz (President)

**Contact details.** Bundesverwaltungsgericht
P.O. Box
CH-9023 St. Gallen 14
Switzerland
T +41 58 705 26 26
F +41 58 705 29 80
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W www.bundesverwaltungsgericht.ch

**Outline structure.** The FAC has one President, one Vice-president and up to 75 full-time 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 federal 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.

Federal Criminal Court
The Federal Criminal Court decides on matters related to the Secretariat's investigative measures. Its decisions can be referred to the Federal Supreme Court.

Other bodies
The ordinary courts can try actions based on the Competition Act's civil law provisions. 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.

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Qualified. Geneva Bar, 2004
Areas of practice. Competition law; corporate law; and commercial transactions.
Recent transactions
Counsel to a leading media group in relation to alleged excessive pricing and resale price maintenance in the book sector.

Represented a public electricity producer in a concentration resulting in the takeover of an electricity provider.

Counsel to a leading real estate group in a concentration involving a private hospital group.

Represented the private equity department of a major European insurance company in a concentration involving travel agency companies.

Represented a major European private equity fund in a concentration involving sports marketing companies.

Represented a multinational company in a Secretariat investigation into alleged anti-competitive exchanges of confidential information between members of a trade association in the perfume and cosmetic sector.

Reviewed several distribution agreements and advertising policies for companies in the food, fashion, cosmetics and secured identification sectors.

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Areas of practice. Competition law; corporate law; and commercial transactions.

Recent transactions

Counsel to a leading media group in relation to alleged excessive pricing and resale price maintenance in the book sector.

Represented a public electricity producer in a concentration resulting in the takeover of an electricity provider.

Recently advised on merger filings involving, among others, media companies and electricity provider.

Represented a major European private equity fund in a concentration involving sports marketing companies.

Counsel to media companies in relation to a notification to the FCC of a potentially restrictive agreement.