The Secretariat of the Swiss Competition Commission (“ComCo”) advises on the obligation to notify a concentration

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Marcel Meinhardt, Suzan Hacisalihzade (Lenz & Staehelin)

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Under Swiss law, a proposed concentration triggers a mandatory pre-merger notification if one of the undertakings concerned was held dominant, irrespective of the statutory turnover thresholds. It was previously unclear whether this criterion had to be met at the time of signing or at the time of closing. The authority has now clarified this question.

Obligation to notify a proposed concentration

Pursuant to Article 9(4) of the Federal Act on Cartels and other Restraints of Competition (“**CartA**”), and irrespective of whether the turnover thresholds of Article 9(1) and (3) CartA have been reached, a proposed concentration must be notified to the Swiss Competition Authorities if (i) one of the undertakings concerned has been held dominant on a market in Switzerland in a final and non-appealable decision in proceedings under the CartA, and (ii) the concentration concerns either that market or an adjacent, upstream or downstream market thereof.

Background of the request for advice

In the case at hand, the turnover of the undertakings concerned in the concentration did not meet all the thresholds of Article 9(1) CartA. However, one of the undertakings concerned controlled a subsidiary, which ComCo had found to be dominant on a market related to the proposed concentration.

This decision on dominance had been appealed and was, at the time of signing, pending before the Federal Supreme Court. The timing for passing this judgment was unclear. Hence, the undertakings concerned could not exclude that the Federal Supreme Court would affirm the decision on the dominant position before the closing of the concentration. The question was whether an obligation to notify the concentration would arise in such a case.

Therefore, the undertakings concerned approached the Secretariat of ComCo, which had to clarify whether the decision on the dominant position had to be final and non-appealable at the time of the signing or at the time of the closing of the transaction.

Relevant date to determine an obligation to notify a concentration

In its advice, the Secretariat of ComCo points out that the legislator, in general, intended to create merger notification obligations that undertakings may easily apply. This holds also true for the criterion of a final and non-appealable decision on dominance.

If the relevant date to determine an obligation to notify were the date of closing, there would be uncertainty until the day of closing whether the concentration triggered a mandatory pre-merger filing or not. Such uncertainty would undermine the principle of legal certainty.

Furthermore, if the underlying facts of the case at the date of closing were pertinent this would violate the principle that a notification must occur *prior* to closing. By definition, it is impossible to notify a transaction prior to closing and to base such notification on facts as per the date of such closing.

Finally, also the turnover thresholds of Article 9(1) CartA are based on the annual reports and the turnover information of the last financial year available at signing.

Conclusion

The facts at the time of signing are relevant in order to determine whether there is an obligation to notify a concentration pursuant to Article 9(4) CartA. The decision regarding dominance must therefore be final and non-appealable at this time in order to trigger a mandatory pre-merger notification.

By contrast, a final and non-appealable decision on dominance issued between signing and closing does not trigger an obligation to notify a concentration under Swiss competition law.

The advice issued by the Secretariat of ComCo is not legally binding. However, the Secretariat of ComCo would be expected to maintain this legal position in an actual proceeding