

Ordinance on the Control of Mergers of Enterprises¹

(AS 1996 1658)

of 17 June 1996

(position as at 23 March 2004)

The Swiss Federal Council

having regard to Article 60 of the Cartel Act of 6 October 1995² (Cartel Act),

hereby orders:

Art. 1 Acquisition of Control

An enterprise acquires control over a previously independent enterprise within the meaning of Article 4 para 3 littera b of the Cartel Act if it is able to exercise a controlling influence over the activities of the other enterprise by the acquisition of participation rights or by other means. The means to control may in particular be, either individually or in combination:

- a. ownership rights or rights of use in respect of all or parts of the assets of an enterprise;
- b. rights or agreements which grant the possibility of exercising a controlling influence over the composition, the deliberations or decisions of the organs of an enterprise.

Art. 2 Joint Ventures

1. A situation whereby two or more enterprises acquire joint control over an enterprise which previously was not under their joint control shall be deemed a merger of enterprises within the meaning of Article 4 para 3 littera b of the Cartel Act if the joint venture performs all functions of an independent economic entity on a lasting basis.
2. The founding of an enterprise by two or more entities which they shall jointly control constitutes a merger if the joint venture performs the functions pursuant to paragraph 1 and if it incorporates business activities from at least one of the controlling enterprises.

Art. 3 Enterprises Involved

1. The relevant thresholds according to Article 9 paragraphs 1-3 of the Cartel Act shall be calculated with reference to the turnover of the enterprises involved in the merger. Pursuant to this Ordinance, the enterprises involved shall be:
 - a. in cases of a merger: the merging enterprises;
 - b. in cases of acquisition of control: the controlling and controlled enterprises.

¹ Diese Übersetzung wurde von Herrn Dr. iur. Alessandro Celli und Frau Nicola Benz zur Verfügung gestellt.

² SR 251

2. If a part of an enterprise is the subject of the merger, this part shall be deemed to be an involved enterprise.

Art. 4 Calculation of Turnover

1. For the calculation of turnover, all reductions on earnings such as discounts, rebates, value added tax and other use taxes as well as other taxes allocated directly to turnover shall be deducted from the proceeds earned by the involved enterprises through goods and services in the course of their ordinary business activities in the last business year.
2. Business years which do not cover a full twelve month period shall be treated as a full twelve month period by taking the average turnover for the months covered. Turnover in foreign currencies shall be converted into Swiss francs in accordance with generally accepted accounting principles applicable in Switzerland.
3. If, within a period of two years, two or more events occur between the same enterprises resulting in the acquisition of control over parts of these enterprises, these events shall be treated as a single merger for the turnover calculation. The date of the last event is determinant.

Art. 5 Turnover of an Enterprise Involved

1. The turnover of an enterprise involved shall consist of the turnover from its own business activities and the turnover of:
 - a. the enterprises in which it owns more than one half of the capital or holds more than one half of the voting rights or is entitled to designate more than one half of the members of the executive body or otherwise has the right to direct the business of the enterprise (a subsidiaries);
 - b. the enterprises which alone or collectively have the rights or ability to exercise influence pursuant to littera a (parent companies);
 - c. the enterprises in which an enterprise under littera b has the rights or ability to exercise influence pursuant to littera a (sister companies);
 - d. the enterprises over which more than one enterprise listed in this paragraph jointly has the rights or ability to exercise influence pursuant to littera a (joint venture companies).
2. In calculating the total turnover of an enterprise involved, the turnover from business activities between the enterprises set forth in paragraph 1 shall not be taken into account.
3. The turnover of a joint venture that is jointly controlled by the enterprises involved shall be allocated to these enterprises in equal parts. Paragraph 2 shall apply accordingly.

Art. 6 Calculation of Gross Premium Income of Insurance Companies

1. Gross annual premium income shall include all premiums invoiced from the direct insurance or reinsurance business in the previous business year, including those from the

portions which are reinsured outwards and after deduction of taxes or other levies on the direct insurance premiums. In calculating the portion to be allocated to Switzerland, gross premium income paid by persons resident in Switzerland is relevant.

2. Article 4 paragraphs 2 and 3 and Article 5 shall apply accordingly.

Art. 8³ Calculation of Thresholds if Banks *or other Financial Intermediaries* are Involved

1. Gross income shall include all income earned from ordinary business activities in the previous business year pursuant to the provisions of the Federal Act of 8 November 1934⁴ regarding banks and savings institutions and its implementing orders, including:
 - a. interest and bank discount income;
 - b. interest and dividend income from securities;
 - c. interest and dividend income from financial assets;
 - d. commission income from credit transactions;
 - e. commission income from security and asset transactions;
 - f. commission income from other services;
 - g. profits from trading transactions;
 - h. profits from disposal of financial assets;
 - i. income from participations;
 - j. income from real estate; and
 - k. other ordinary income.
2. Value added tax and other taxes directly related to the gross income may be deducted therefrom.
3. Banks and other financial intermediaries that apply international accounting provisions calculate gross income in analogy with the above provisions.
4. If a part only of the enterprises involved in a merger are banks or financial intermediaries or if they are only partially active in such businesses, the gross income of these enterprises or parts of enterprises is to be computed and added to the turnover or gross premium income of the other enterprises or parts of enterprises involved in order to ascertain whether the threshold values are met.

³ Amended pursuant to Paragraph I of the Ordinance of 12 March 2004 (AS 2004 1395).

⁴ SR 952.0

5. Article 4 paragraphs 2 and 3 and Article 5 shall apply accordingly.

Art. 9 Notification of Merger Intentions

1. Notification of an intention to merge must be filed with the Secretariat of the Competition Commission (Secretariat) in five copies:
 - a. in the case of a merger, jointly by the enterprises involved;
 - b. in the case of an acquisition of control, by the enterprise or enterprises acquiring control.
2. In the case of joint notification, the notifying enterprises must designate at least one joint representative.
3. Notifying enterprises or their representatives domiciled or residing abroad must designate a domicile address in Switzerland for service of documents.

Art. 10 Notification to the Banking Commission

The Competition Commission shall notify the Federal Banking Commission immediately of notifications of intentions to merge involving banks within the meaning of the Federal Law on banks and savings institutions of 8 November 1934⁵.

Art. 11 Contents of Notification

1. The notification must contain the following information:
 - a. name, domicile and a brief description of the business activities of the enterprises that must be taken into consideration in the calculation of the relevant thresholds pursuant to Articles 4-8, as well as of the sellers of the participations;
 - b. a description of the merger intentions, the relevant facts and circumstances and the purposes that will be pursued through the intention to merge;
 - c. the turnover, balance sheet totals and/or gross premium income of the enterprises involved calculated in accordance with Articles 4-8 as well as the portion to be allocated to Switzerland;
 - d. information on all product and geographical markets that are affected by the merger and in which two more of the enterprises involved jointly hold a market share of 20 per cent or more of the Swiss market or in which one of the enterprises involved holds a market share of 30 per cent or more of the Swiss market, and a description of these markets, which contains as a minimum information on the distribution and demand structures as well as on the importance of research and development;

⁵ SR 952.0

- e. with regard to the markets referred to under littera d, the market shares of the enterprises involved for the past three years and, if available, for each of the three principal competitors as well as an explanation of the basis used for calculating the market share;
 - f. for the markets referred to under littera d, information regarding enterprises that have newly entered the market in the previous five years as well as on those enterprises that could enter these markets within the next three years and, if possible, the costs that would arise from an entry into the market.
2. The notification must be accompanied by the following documents:
- a. copies of the most recent annual accounts and annual reports of the enterprises involved;
 - b. copies of the agreements, through which the merger is achieved or that are otherwise connected with the merger, insofar as their relevant contents are not already contained in the information disclosed under paragraph 1 littera b;
 - c. in the case of a public offer, copies of the offer documentation;
 - d. copies of the reports, analyses and business plans made with regard to the merger insofar as they contain relevant information for the assessment of the merger, insofar as the information is not already contained in description disclosed under paragraph 1 littera b.
3. The product and geographic markets pursuant to paragraph 1 litterae d-f shall be determined as follows:
- a. the product market includes all goods or services that are considered by the opposite party in the market as substitutes in view of their characteristics and foreseeable purposes of use.
 - b. The geographic market includes the territory in which the opposite party in the market offers or demands the goods and services covered by the product market.
4. Notifications must be made in one of the official languages. Proceedings will be conducted in that language unless otherwise agreed. Accompanying documents may also be filed in the English language.

Art. 12 Simplified Notification

Prior to the notification of a merger, the enterprises involved and the Secretariat may mutually agree on particulars of the contents of the notification. The Secretariat may thereby grant an exemption from the duty to submit particular information or documents set out in Article 11 paragraphs 1 and 2 if it is of the opinion that such information is not required for the assessment of the case. The duty to disclose additional information and documents pursuant to Article 15 is reserved.

Art. 13 Notification Forms and Explanations

1. The Competition Commission may detail the information required under Article 11 in notification forms and may explain the notification requirements in more detail. It may determine the extent to which a notification filed with a foreign authority may be used for the notification of merger intentions in Switzerland.
2. The Competition Commission publishes the notification forms and explanations in the Federal Bulletin.

Art. 14 Confirmation of Completeness of Notification

The Secretariat shall provide written confirmation of receipt of the notification and its completeness to the notifying enterprises within ten days. In cases where the information or documents are incomplete in any material point, the Secretariat shall within the same period require the notifying enterprises to supplement the notification.

Art. 15 Additional Information and Documents

1. Even after confirmation of the completeness of the notification, the enterprises involved and associated enterprises within the meaning of Article 5 as well as the sellers of participations must disclose to the Secretariat, within the periods specified, such additional information and documents as may be relevant for the examination of the merger intentions. In particular, information on past or planned sales or turnover figures and on market development and their position to the international competition must be disclosed.
2. The Secretariat may request concerned third parties to provide information that may be relevant for the assessment of the intended merger. The Secretariat may inform third parties of the intended merger in an appropriate manner while protecting the business secrets of the enterprises involved, associated enterprises within the meaning of Article 5 and the sellers.

Art. 16 Permission for Implementation

1. The enterprises involved may implement the merger prior to expiry of the one month period pursuant to Article 32 para 2 Cartel Act if the Competition Commission notifies them that it regards the merger as unobjectionable.
2. If the Competition Commission permits the implementation pursuant to Articles 32 para 2 and 33 para 2 of the Cartel Act, it may make the implementation subject to certain conditions and requirements. In cases where permission to implement is granted in connection with a public offer, it may order that the voting rights acquired by the offerer be used solely for the preservation of the value of its investment.

Art. 17 Permission for Implementation involving Banks

If the Federal Banking Commission regards a merger of banks as necessary for the protection of creditors, it may, upon motion of the banks involved or ex officio, allow implementation at any stage of the proceedings and, if required, prior to the receipt of the notification of the merger intentions pursuant to Articles 32 para 2 and 33 para 2 in connection with Article 10

para 3 of the Cartel Act. Prior to its decision, it will invite the Competition Commission to comment.

Art. 18 Publication of the Commencement of Examination

If the Competition Commission decides to commence an examination pursuant to Article 32 of the Cartel Act, such decision shall be published in the earliest possible edition of the Federal Bulletin and the Swiss Commercial Gazette. The publication shall contain the name, domicile and business activities of the enterprises involved and a brief description of the merger as well as the period during which third parties may comment on the notified merger intentions.

Art. 19 Third Party Comments

Comments from third parties pursuant to Article 33 para 1 of the Cartel Act shall be made in writing. The Secretariat may order a hearing in individual cases.

Art. 20 Time Periods

1. The one month period for the commencement of an examination pursuant to Article 32 para 1 of the Cartel Act shall commence on the day following receipt of a complete notification and shall expire at the end of the day in the following month which has the same number as the day upon which the period commenced; should this day not exist in the following month, then the period shall expire on the last day of such month. Article 22a of the Federal Law on administrative procedure of 20 December 1968⁶ shall not apply.
2. The enterprises involved shall be notified of the decision to conduct an examination within the one month period set out in Article 32 para 1 of the Cartel Act.
3. The period for carrying out the examination pursuant to Article 33 para 3 of the Cartel Act shall commence on the day after service of the decision of the Competition Commission to commence an examination pursuant to Article 10 of the Cartel Act. Paragraph 1 shall apply to the calculation of the period.

Art. 21 Material Change in Circumstances

The Secretariat must be notified forthwith and unasked of any material changes in the circumstances described in the notification. If these changes have a considerable effect upon the assessment of a merger intention, the Secretariat may decide prior to the commencement of an examination, or the Competition Commission may decide after commencement of an examination, that the period under Article 20 shall commence only upon the day after the Secretariat's receipt of notification of the material changes.

Art. 22 Report on Unobjectionable Mergers

⁶ SR 172.021

The Competition Commission shall report to the Federal Department of Economics on an ongoing basis on the mergers which it has deemed unobjectionable. It shall identify the enterprises involved and briefly describe the reasons why no examination procedure was commenced in respect of the merger subject to notification (Article 32 para 1 Cartel Act), why the merger was not prohibited or why no conditions or requirements were ordered.

Art. 23 Publication of Decision after Termination of Examination

Following termination of an examination, the Secretariat shall publish the decision of the Competition Commission in the Federal Bulletin and the Swiss Commercial Gazette. The publication shall contain the name and seat of the enterprises involved, a brief description of the intended merger, a summary account of the grounds for the decision and the decision itself.

Art. 24 Transitional Provisions

1. Mergers within the meaning of the Cartel Act shall not be subject to notification for a period of four months after the Act comes into effect, provided:
 - a. the agreement regarding the merger was entered into prior to the entry into effect of the Act;
 - b. a public offer was published prior to the entry into effect of the Act.
2. If the implementation in Switzerland is not permitted due to an interim prohibition on implementation resulting from a public law procedure for permission, including foreign merger control procedures, the four month period shall be stayed until the interim prohibition on implementation is lifted.

Art. 25 Entry into Effect

This ordinance shall enter into effect on 1 July 1996.