Mergerfilers.com
GLOBAL LEGAL GUIDES

SWITZERLAND

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No new regulation adopted or proposed

Note that relevant regulations may be changed before your contemplated transaction is completed. Mergerfilers.com and our national experts keep information on regulations up to date and even provide alerts on adopted or proposed changes that have not come into force yet but may come into effect before the transaction is completed. When this field is green, we have no knowledge of such imminent changes to the relevant regulations.

Relevant legislation and authorities

1) Is a merger control regulation in force ?

Yes. Swiss merger control is mainly governed by Articles 9 ff. and 32 ff. of the Federal Act on Cartels and Other Restrictions of Competition as well as by the Ordinance on the Control of Concentrations of Undertakings.

2) Which authorities enforce the merger control regulation?

Merger control is enforced by the Competition Commission (ComCo), ComCo's chamber for concentrations (Chamber) and ComCo's secretariat (Secretariat).

The Secretariat processes the notifications and investigates the cases. It submits the request to clear the proposed concentration to the Chamber or to open a phase II investigation. The Chamber clears cases in phase I. Both the Chamber and ComCo can decide to open a phase II investigation. ComCo decides whether to clear or prohibit a proposed merger in phase II.

3) Relevant regulations and guidelines with links:

The merger regulation is essentially included in Articles 9 ff. and 32 ff. of the Act on Cartels and the Ordinance on the Control of Concentrations of Undertakings. Links to the relevant legislation, guidelines and forms are listed here:

Original German version	Unofficial English translation
Kartellgesetz	Swiss Act on Cartels
Verordnung über die Kontrolle von Unternehmenszusammenschlüssen	Ordinance on the Control of Concentrations of Undertakings
Merkblatt und Formular Zusammenschlussvorhaben	Notice and form for proposed concentrations (translation into English not available)
Praxis zur Meldung und Beurteilung von Zusammenschlüssen	Notice of ComCo on the notification and assessment of concentrations (translation into English not available)

4) Does general competition regulation apply to mergers or ancillary restrictions?

Restrictions that are directly related and necessary to the implementation of a concentration are considered to be ancillary restrictions and therefore lawful. The Secretariat and ComCo apply the same principles as the European Commission.

However, based on an old judgment of the Swiss Federal Supreme Court, it may be argued that also more excessive restrictions would be lawful. In that particular case, the Federal Supreme Court held that a non-compete with a duration of more than 14 years was lawful. However, ComCo has deliberately ignored this judgment.

The parties can ask the Secretariat to assess whether a certain arrangement constitutes an ancillary restraint. The parties then have to reason why the restraint is ancillary. If the restraint is considered ancillary it is also covered by the clearance notice. The parties can waive this right for a review. This means that ComCo may

later challenge a restraint as not being ancillary.

Restrictions that are not deemed to be ancillary are not necessarily unlawful. They are assessed under the general rules governing arrangements (Article 4(1) and 5 CA, the Swiss equivalent to Article 101(1) TFEU).

ComCo and its Secretariat have stated that they have the power to prohibit a concentration based on Article 7 CA (the Swiss equivalent to Article 102 TFEU) (based on the Continental Can doctrine). However, so far ComCo has never used this alleged power (also in cases where dominant undertakings acquired their competitors and where that transaction fell below the notification thresholds). Also, it is doubtful whether ComCo indeed has this right.

5) May an authority order a split-up of a business irrespective of a merger?

In practice no. In theory, it would be possible even though in most cases a split-up would be considered disproportionate.

6) Other authorities that also require merger filing or may prohibit transaction

(Note that this may not be an exhaustive list and that industry - specific legislation should always be considered.Furthermore, a merger will often require change of registrations with – but not approval from – the companies register, land register and authorities that have issued permits for the activities of the merging parties.)

Depending on the industry in which the parties are active, additional regulatory approvals may be necessary. Examples are mergers in the banking, insurance, broadcasting, telecommunication, nuclear energy and air transport sector. Also acquisitions of Swiss real estate companies (i.e., companies whose principal purpose is the holding of real estate in Switzerland and whose assets include a significant portfolio of residential properties in Switzerland) require an additional regulatory approval. So far, there are no generally applicable Swiss laws (such as catch-all rules in foreign trade legislation) that prohibit or require a specific screening of foreign investments in Switzerland on the basis of national interest.

7) Are any parts of the territory exempted or covered by particular regulation?

No.

Voluntary or mandatory filing

8) Is merger filing mandatory or voluntary?

A filing is mandatory if the thresholds are met.

Types of transactions to file – what constitutes a merger

9) Is there a general definition of transactions subject to merger control?

A transaction is caught if it constitutes a merger (i.e., an acquisition of control or a merger between previously independent undertakings). The notion of merger is the same as under the EU Merger Control Regulation (139/2004).

A merger occurs if:

1. two or more previously independent undertakings merge into one undertaking;
2. one or more persons who already control at least one undertaking, or one or more undertakings – by an agreement to purchase shares or assets or by any other means – acquire direct or indirect control of the entirety of or parts of one or more other undertakings; or
3. two or more undertakings create a jointly controlled full function joint venture (i.e. a joint venture that will perform on a permanent basis all the functions of an independent business entity).

Note that certain transactions of a temporary nature are not considered to be mergers subject to merger control (see topics 19 and 20).

10) Is 'change of control' of a business required?

Yes, a merger requires the change respectively the acquisition of control (which includes mergers of two previously independent businesses as well as the creation of a jointly controlled full function joint venture).

11) How is “control” defined?

‘Control’ is the ability to exercise decisive influence on the activities of the other undertaking through the acquisition of participation rights or any other means. The means by which control can be acquired include, either separately or in combination:

- ownership or the right to use all or part of the assets of the undertaking; and
- rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

The concept of 'control’ is the same as the one under the EU Merger Control Regulation (139/2004).

12) Acquisition of a minority interest

The acquisition of a minority interest only constitutes a merger if it involves an acquisition of sole or joint control on a de jure or de facto basis.

13) Joint ventures/joint control – which transactions constitute mergers?

The following transactions regarding businesses subject to joint control constitute a concentration:

1. Creation of a full function joint venture.
2. Acquisition of joint control in an existing undertaking.
3. Change in participants/owners – for instance if one of the controlling undertakings sells its share in a joint venture to another undertaking, or if one of the controlling undertakings is acquired by another undertaking. In the latter case, ComCo may consider that the transaction results in two separate concentrations and that these should be assessed separately with respect to who are parties to the transaction and whether the thresholds are exceeded.
4. Dissolution – provided (part of) the business of the joint venture is transferred to one or more of the undertakings controlling the joint venture or a third party

5. Change in or extension of the activities of a joint venture – provided that further assets, contracts, know-how, rights etc. are transferred to the joint venture to form the basis for the new activities.

In cases where a new joint venture is created, ComCo requires that the joint venture is a full-function joint venture. In cases where the parent undertakings acquired joint control over an existing undertaking, ComCo has not always been clear whether the “full functionality”-criterion needed to be fulfilled.

Thresholds that decide whether a merger notification must be filed

14) Which thresholds decide whether a merger notification must be filed?

a) Turnover thresholds

A merger notification must be filed if:

1. the combined total annual turnover of all undertakings concerned is at least CHF 2 billion worldwide or at least CHF 500 in Switzerland; and
2. the total annual turnover in Switzerland of each of at least two of the undertakings concerned is at least CHF 100 million.

b) Market share thresholds

N/A

c) Value of transaction thresholds

N/A

d) Assets requirements

N/A

e) Other

Transactions that do not meet the turnover thresholds must be notified if:

1. one of the undertakings concerned has been held to be dominant in a market in Switzerland in in a final and non-appealable decision under the Act on Cartels; and
2. the merger concerns that market, an adjacent market or an upstream or downstream market.

Such decision must have been issued by ComCo. Arguably, a civil court judgment does not trigger the dominance threshold. A considerable part of the notifications made to the Secretariat are filed based on the dominance threshold (particularly in the media and telecom sectors).

15) Special thresholds for particular businesses

The thresholds stated in topic 14 apply to all mergers in all sectors.

16) Rules on calculation and geographical allocation of turnover

The rules on calculation and geographical allocation of turnover are generally interpreted in accordance with the European Commission's *Consolidated Jurisdictional Notice.*

Turnover is calculated on the basis of the most recent accounts of a financial year of the undertakings involved as well as their affiliated companies, including any direct or indirect parent companies, subsidiaries, joint ventures and subsidiaries of parent companies. The turnover a joint venture has with third parties, is divided equally between the controlling owners irrespective of their share in the capital and the actual distribution of profit; i.e., if the shares in a joint venture are divided 60/40 between two participants who exert joint control, half of the turnover of the joint venture must be attributed to each participant.

"Turnover" is the net turnover derived from sale of products and services within the undertaking's ordinary activities after deduction of (i) value added tax and other taxes directly related to the sales and (ii) any turnover between affiliated companies.

Turnover must be adjusted to take account of any divestments or acquisitions of businesses after the end of the financial year that the turnover calculation is based on.

Generally, turnover from products and services sold to customers who are resident in Switzerland is considered Swiss turnover. The European Commission's *Consolidated Jurisdictional Notice* contains special guidelines that also apply in this respect.

17) Special rules on calculation of turnover for particular businesses

Insurance undertakings

For an insurance undertaking the value of the gross premiums written applies. This includes all premiums received by the insurance undertaking during the relevant year. Amounts paid by the undertaking for reinsurance are not deducted.

Banks

For banks the gross income is relevant, including:

1. interest and discount revenue;
2. interest and dividend income from securities;
3. interest and dividend income from financial assets;
4. commission income from credit transactions;
5. commission income from security and asset transactions;
6. commission income from other services;
7. profits resulting from trading transactions;
8. profits resulting from disposal of financial assets;
9. income from shareholdings;
10. income from real estate; and
11. other ordinary income.

18) Series of transactions that must be treated as one transaction

Transactions that are interdependent because they are linked by conditions must be treated as one if control

in each transaction is acquired ultimately by the same undertaking(s).

Furthermore, if the same parties enter into different transactions that are not interdependent regarding the sale of different businesses or different parts of a business, all such transactions within a two-year period must be treated as one and the same merger (so-called salami-rule).

See also topic 19 regarding temporary control.

Exempted transactions and industries (no merger control even if thresholds ARE met)

19) Temporary change of control

A filing is only required if there is a change of control on a lasting basis.

In accordance with the European Commission's Consolidated Jurisdictional Notice change of control may be considered temporary – and therefore not require a notification – if a merger is divided into steps.

An example is where several undertakings jointly acquire control of another undertaking but according to a pre-existing plan, immediately after completion split the assets of the undertaking between themselves. In that situation, the temporary joint control will not be subject to merger filing, but the split-up of the assets may require one or several merger filings.

Another example of temporary control is when joint control is established for a limited period before the acquirer obtains sole control, for instance because the seller has agreed on an earn-out payment and the seller retains important veto rights for a limited period. Generally, if the period does not exceed 1 year, only the acquisition of sole control may be subject to merger filing.

Control may also be considered temporary in the situations mentioned under 1) and 2) in topic 20.

20) Special industries, owners or types of transactions

There is arguably no obligation to file a notification in the following situations:

1. Where credit institutions, other financial undertakings or insurance companies whose normal activities include transactions and dealing in securities are temporarily in possession of interests in an undertaking acquired with the intention to resell, provided that they a) do not exercise voting rights for the purpose of determining the competitive conduct of that undertaking or b) exercise voting rights exclusively with the aim of preparing the disposal of all or part of that undertaking and that the disposal takes place within one year of the date of acquisition;
2. Where control is acquired by a professional who has powers under current insolvency legislation to deal with and dispose of the undertaking;
3. Where the transactions are carried out by a financial holding company, provided that the voting rights held by such a company are only exercised to retain the full value of the acquired undertaking and not to determine its competitive conduct.

Note that these exceptions do generally not apply to typical private equity transactions.

21) Transactions involving only foreign businesses (foreign-to-foreign)

There is no such thing as a local impact test. A local impact is assumed if either the turnover or the dominance threshold is met.

As regards the turnover threshold, an exception exists if two or more undertakings acquire joint control over a joint venture that has neither activities nor turnover in Switzerland and if such activities and turnover in Switzerland of the joint venture are neither planned nor expected in future.

22) No overlap of activities of the parties

There is no exemption for mergers with no overlap of activities.

23) Other exemptions from notification duty even if thresholds ARE met?

No.

Merger control even if thresholds are NOT met

24) May a merging party file voluntarily even if the thresholds are not exceeded?

No.

25) May the competition authority request a merger notification or oppose a transaction even if thresholds are not met?

No. In theory, ComCo may claim that it can oppose a merger under the Continental Can-doctrine (see topic 4). But so far, ComCo has never done so.

Referral to and from other authorities

26) Referral within the jurisdiction

In the context of mergers involving banks, the Swiss Financial Market Authority (FINMA) may take the position of the ComCo, where FINMA deems such merger to be necessary for the protection of creditors. In such cases, FINMA is obliged to give the ComCo an opportunity to comment on the proposed merger.

27) Referral from another jurisdiction

N/A

28) Referral to another jurisdiction

N/A

29) May the merging parties request or oppose a referral decision?

N/A

Filing requirements and fees

30) Stage of transaction when notification must be filed

The notification can be filed at any time before closing; there is no deadline for filing. However, clearance must be obtained to close the merger.

Filing before signing is possible if the undertakings concerned demonstrate a good-faith intention to conclude an agreement. Analogous considerations apply in the case of a public bid.

31) Pre-notification consultations

Parties are encouraged to submit a draft notification for review by the Secretariat. The Secretariat reviews the draft notification within one to two weeks and informs the parties whether it requires any additional information. Filing a notification without pre-notification will usually prompt the Secretariat to declare the notification incomplete.

32) Special rules on timing of notification in case of public takeover bids and acquisitions on stock exchanges

There are no special rules for handling public takeover bids. While under the EU Merger Control Regulation (139/2004), a public bid which has been notified may be implemented provided that the acquirer does not exercise the voting rights attached to the securities in question, in contrast, under the Swiss merger control regime, the acquisition of the shares constitutes an implementation, regardless of whether the voting rights attached to the respective securities are exercised.

Upon specific request, however, ComCo can grant permission for early implementation of a merger for valid reasons. Such valid reasons have been deemed to exist in case of a public bid.

33) Forms available for completing a notification

Merkblatt und Formular Zusammenschlussvorhaben is the only form available regardless of the type of merger. In this form, the ComCo states that the notification must include the following information:

- the names, domiciles and a brief descriptions of the business activities of the affiliated undertakings and the seller;
- a description of the proposed merger, the relevant facts and circumstances and the purposes to be achieved through the proposed merger;
- the worldwide and Swiss turnover of each undertaking;
- a description of all product and geographic markets in which the parties are active and that relate to the merger – in particular, a description of all affected markets (i.e., markets where two or more of the undertakings concerned will hold a combined market share in Switzerland of 20% or more or where one of the undertakings concerned holds a market share in Switzerland of 30% or more). In theory, the 30% threshold includes not only vertically related markets, but all markets in which one of the parties has a market share of at least 30%. However, in practice, it is usually possible to obtain a waiver for markets where one party has a market share of at least 30% and there is no vertical relationship between the undertakings concerned in relation to that market;

- with regard to the affected markets referred to above, a description of the structure of distribution and demand, the market shares held by the undertakings for the past three years and those held by each of the three main competitors;
- with regard to the affected markets, the undertakings that have entered the market during the past five years as well as the undertakings which may enter these markets within the next three years, if available, the costs associated with such entry on the market, and factors influencing the cost of a market entry; and
- a description of any ancillary restraints and the reasons why such restraints are ancillary to the merger if the parties want ComCo to assess the ancillary restraints.

34) Languages that may be applied in notifications and communication

The filing can be submitted only in German, French or Italian (not English). Annexes can be filed in English.

35) Documents that must be supplied with notification

The following documents must be filed:

- the transaction documents (eg, the share purchase agreement);
- the annual reports of the undertakings;
- documents prepared for an officer or director discussing the competitive effect of the concentration; and
- a power of attorney.

These documents can be filed in English, German, French or Italian. There are no specific requirements for submission of documents (eg, apostillisation or notarisation). Copies are sufficient.

In addition, where the merger must also be notified to the European Commission, the Secretariat expects the parties to include the Form CO and indicate the names and contact details of the case handlers of the European Commission.

See topic 34 about other information to be included in the notification form.

36) Filing fees

There is a flat fee of CHF 5,000 for Phase I proceedings (which includes the pre-notification procedure). If a phase II investigation is opened, fees will be calculated on the basis of the time spent by the Secretariat on the case (CHF 100 to CHF 400 per hour, depending on the seniority of the staff involved and the priority of the case). Fees in phase II investigations can reach CHF 100,000 or more.

Implementation of merger before approval – “gun jumping” and “carve out”

37) Is implementation of the merger before approval prohibited?

Yes, unless ComCo has given permission, the parties cannot implement the merger prior to the approval.

Unlike under the EU Merger Control Regulation (139/2004), a public bid which has been notified cannot be implemented without permission of ComCo even if the acquirer does not exercise the voting rights attached to the securities in question (see topic 32).

38) May the parties get permission to implement before approval?

ComCo can grant permission for early implementation of a merger for valid reasons. Such valid reasons are deemed to exist where a delayed closing would create financial difficulties for the target or in case of a public bid.

39) Due diligence and other preparatory steps

Preparatory steps and due diligence are allowed to the same extent as in the EU. There are no guidelines of ComCo on this subject, however.

As a general rule, any due diligence should be conducted under a non-disclosure agreement obliging the buyer to use the data disclosed only for the purpose of evaluating the merger. In case the buyer and the target are actual or potential competitors, competitively sensitive data should only be made accessible under a clean team agreement.

Steps that prepare the closing (such as discussing the future organizational structure and agreeing on the steps of the implementation) are allowed if they do not consummate the concentration like transferring the shares or the purchase price or appointing representatives in the board of the target. The parties have to continue to act as independent undertakings. As regards the exchange of information, the parties should only exchange data that is necessary to plan the implementation. Again, in case the buyer and the target are actual or potential competitors, competitively sensitive data should only be made accessible under a clean team agreement.

40) Veto rights before closing and 'Ordinary course of business' clauses

An "ordinary course of business" clause that protects the value of the target, for example by preventing the seller from making decisions outside the course of its ordinary business, is generally acceptable.

However, it must be assessed on a case-by-case basis to what extent the parties may discuss – or provide each other with veto rights concerning – any decisions in their respective businesses.

41) Implementation outside the jurisdiction before approval – 'Carve out'

Closing is only permitted if the suspension requirement has been derogated. In theory, it may be possible to carve out (i.e., ring fence or hold separate) the businesses or assets outside Switzerland and implement global closing. In practical terms, however, such carve out would in most cases require a derogation from the suspension requirement.

42) Consequences of implementing without approval/permission

If a reportable merger is implemented without approval/permission, a fine of up to CHF 1 million can be

imposed. The fine is usually (but not necessarily only) imposed on the undertaking acquiring control (i.e., not on the target). In case of a merger (in its narrow legal sense, i.e. two business entities merging into a single entity), the fine will be imposed on the parties to the merger. Fines are calculated based on the following objective criteria:

- whether the notification requirement was breached intentionally or negligently;
- importance of the undertakings involved in the relevant market;
- whether prima facie the merger constitutes a threat to competition. Such a threat is presumed if the total aggregate market share of the enterprises involved in the merger is 20% or more (or, if no market shares are combined, the market share of one of these companies is 30%); and
- whether the merger adversely affects effective competition; that is, whether it creates or strenghtens a dominant market position that eliminates effective competition (without strenghtening competition in another market in a way that outweighs the negative effects of the dominant market position).

In addition, individuals implementing a reportable merger without prior clearance are subject to a fine of up to CHF 20,000.

Further, the implementation of a reportable merger before clearance is void.

The process – phases and deadlines

43) Phases and deadlines

Phase	**Duration/deadline**
Pre-notification phase: There are no formal rules on pre-notification consultations, but it is advisable to file a draft notification. The secretariat generally takes one to two weeks to review the draft notification and informs the parties which additional information it requests. It will then usually accept the notification if the requested additional information is provided. In other words, there is generally only one round of pre-notification consultation.	No set duration or deadline
Assessment of completeness of notification: When the merger notification has been formally submitted, the secretariat must assess whether the notification is complete within 10 calendar days. If the notification is deemed incomplete, the secretariat must declare this within the 10 calendar days' deadline and state which information is missing. If the pre-notification procedure is used, it is very rare that the notification is declared incomplete. There is no deadline for submitting the notification completed with the requested information. If the notification is filed again, the secretariat will	10 calendar days.

assess the completeness again within 10 calendar days. Even if the notification has been declared complete, the secretariat may still request more information and documentation.	
Phase I: The merger is either declared as unproblematic, approved with commitments or it is decided to initiate a phase II investigation of the merger. In theory, the secretariat may undertake the same types of investigations under phase I and II, and the secretariat can also negotiate commitments in both phases. However, problematic mergers are mostly assessed in phase II. In phase I cases the decision not to oppose a merger will be taken by the Chamber of ComCo while a phase II investigation will be initiated by ComCo or its Chamber.	1 month from the day after the Secretariat has received the complete notification.
Phase II: The merger is either declared as unproblematic, approved with conditions/commitments or prohibited. The secretariat will provide the parties with the statement of objections within a few weeks/months after initiating phase II. There is no standardized timeline. The investigation is likely to involve detailed market surveys, potentially an economic analysis and possibly negotiation of commitments that may eliminate the concerns that the secretariat may have regarding anti-competitive effects of the merger. In phase II cases, the decision not to oppose, approve with commitments or prohibit the merger will be taken by ComCo.	Four months from after the day when the parties received the notice of the phase II investigation. Extension: Phase II may be extended: 1. if the parties fail to gather information requested by the Secretariat. 2. if the parties request an extension.

Assessment and remedies/decisions

44) Tests or criteria applied when a merger is assessed

ComCo applies a ‘dominance-plus’ test. A merger can be prohibited only if:

- the merger would create or strengthen a dominant position that could eliminate effective competition; and
- the merger would not improve the competitive conditions in another market to an extent that would outweigh the harm caused by the dominant position.

Generally, this sets a high bar for a prohibition or remedies decision. However, in some instances, ComCo has prohibited mergers that did not meet this high threshold. One example is the prohibition of the Orange/Sunrise merger. This merger was prohibited based on the grounds of collective dominance. However, in essence, ComCo's concern was that of a unilateral effects case. In addition, in other cases ComCo has required conditions and obligations from the parties where it had competitive concerns which did not achieve the prerequisites of the dominance test.

In practice, ComCo will prohibit a merger or request remedies if the merger would:

- lead to horizontal overlaps creating single or collective dominance or unilateral effects;
- create vertical foreclosure effects; or
- create conglomerate or portfolio effects.

45) May any non-competition issues be considered?

As a rule, ComCo does not take into consideration non-competition issues in reviewing a merger. Non-competition considerations may be taken into account if ComCo prohibits the merger and the Federal council is requested to permit the merger due to non-competition considerations..

In connection with a merger involving banks, the Swiss Financial Market Authority (FINMA) has the power to clear a merger that it deems necessary for reasons of creditor protection, which take precedence over competition issues. In such cases, FINMA replaces ComCo, which is given a right of consultation only.

46) Special tests or criteria applicable for joint ventures

There is no special test or criterion for joint ventures.

47) Decisions and remedies/commitments available

ComCo can clear a merger, prohibit it or clear it with conditions and/or obligations. Technically, only decisions prohibiting the merger or clearing it with conditions and/or obligations are issued as formal decisions; while decisions permitting a merger are issued as notices.

If ComCo feels that the merger would create competitive issues, it will ask the parties to propose remedies. Regarding procedure, there is no standardized procedure for negotiating remedies. Parties can start negotiating remedies during the pre-notification procedure. It is also possible to negotiate remedies in phase I, although this is rare, except in cases where remedies have agreed in the parallel proceeding before the European Commission in phase I and where the Secretariat has required the parties to commit to the same remedies in relation to Switzerland. In purely domestic mergers, remedies often are negotiated after the parties have received the statement of objections of the Secretariat in Phase II.

Regarding the substance of remedies, ComCo prefers structural to behavioral remedies. However, there have been numerous cases where ComCo has accepted behavioral remedies.

In cases filed in multiple jurisdictions and where remedies have been imposed by a foreign competition authority, ComCo has often requested the parties to commit to adhere to these remedies in relation to

Switzerland.

Publicity and access to the file

48) How and when will details about the merger be published?

Unlike in other jurisdictions, the notification of a merger/the initiation of phase I proceedings is not made public in Switzerland. However, the initiation of Phase II proceedings is made public in both the Official Journal and a press release. In addition, ComCo publishes a redacted version of all its clearance and prohibition decisions. Exceptionally, ComCo also publishes a press release when it clears a merger in phase I (e.g., if the transaction has attracted widespread public attention). In case of a Phase II decision, a press release is published in any case.

49) Access to the file for the merging parties and third parties

The merging parties:

During the phase I procedure, there is usually no access the file.

In case a phase II investigation is launched, the merging parties have full access to the file, including the file relating to the phase I.

Third parties:

Third parties have no right to access the file.

Judicial review

50) Who can appeal and what may be appealed?

There is a right of appeal, but only the undertakings concerned can appeal the decision. Arguably, only decisions prohibiting the merger or clearing it with conditions can be appealed. In case of a clearance without conditions or obligations, the prevailing view is that the clearance decision cannot be appealed. Third parties have no right of appeal.

An appeal against decisions of ComCo must be filed with the Federal Administrative Court within 30 days of the formal notification of the decision. The duration of this appeal procedure varies, but may well take several years.

Decisions of the Federal Administrative Court may be appealed to the Federal Supreme Court within 30 days of the formal notification of the decision. These proceedings generally take more than one year.