



**INTERNATIONAL BAR ASSOCIATION**

**ANTITRUST SECTION**

**COMMENTS TO THE STATE SECRETARY FOR ECONOMIC AFFAIRS,  
ECONOMIC POLICY DIRECTORATE, SWITZERLAND, REGARDING:**

**PARTIAL REVISION OF THE CARTEL ACT (2022) DATED 24 NOVEMBER 2021**

**March 18, 2022**

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**1. Introduction**

- 1.1 The Merger Working Group (“MWG”) of the Antitrust Section of the International Bar Association (“IBA”) is making the following submission in relation to the draft revision of the Swiss Cartel Act (the “Draft”), which was published by the State Secretary for Economic Affairs on 24 November 2021. While the draft also includes revision of other parts of the Swiss Cartel Act, the MWG limits its comments to the merger control aspects of the proposed revision.

**2. About the IBA**

- 2.1 The IBA is the world’s leading international organisation of legal practitioners, bar associations, and law societies. As the “global voice of the legal profession”, the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, including significant membership from Switzerland, and it has considerable expertise in providing assistance to the global legal community.<sup>1</sup>
- 2.2 The IBA’s Antitrust Section includes competition law practitioners around the world, including Switzerland, with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places the Antitrust Section in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups, such as the MWG, on various aspects of competition law and policy.<sup>2</sup>
- 2.3 The MWG consists of legal practitioners from around the world with extensive experience in merger control in their respective jurisdictions, including Switzerland, and in respect of cross-border matters. It has prepared numerous submissions to governments and competition agencies around the world over the past 15 years.<sup>3</sup>

**3. Notification exemption for transactions notified to the European Commission**

- 3.1 The MWG observes that over the last decade the number of jurisdictions with a merger control regime and/or foreign direct investment controls has been constantly increasing.

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<sup>1</sup> See <https://www.ibanet.org/>.

<sup>2</sup> See <https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/Default.aspx>.

<sup>3</sup> See <https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/WorkingGroupSubmissions.aspx#filter=.mergers>.

This had led to a significant burden for companies involved in international transactions and efforts to ensure that regulation is efficient as well as effective are therefore welcomed by the MWG. The simplification of national merger control regimes and notification obligations save resources for national competition authorities, as well as the companies involved in such transactions.

- 3.2 The Draft proposes to provide for an exemption of the regular notification obligation if the transaction is already subject to review by the European Commission (“EC”), and if at the same time all affected markets can be qualified as at least EEA-wide (including Switzerland). In such a situation, it would be sufficient to provide a copy of the submitted Form CO to the Swiss Competition Commission (ComCo). The MWG appreciates the underlying rationale of the proposed notification exemption and reliance on the determinations about the geography of relevant markets by the EC.
- 3.3 However, the MWG has some concerns regarding the practicability and application of the proposed exemption in real-life transactions. The MWG is concerned that the exemption will be difficult to apply and can lead to uncertain situations, in particular for the timing of a transaction, with the result that many companies will likely decide to make a Swiss filing on a cautionary basis rather than seek to rely on the exemption. In particular, it is a concern that ComCo’s Secretariat can unilaterally decide that a notification nevertheless must be submitted if it deems that one of the markets was wrongfully considered as EEA-wide. This could significantly delay the notification time-table and possibly delay the closing, if an additional notification must be prepared and submitted. As a result, in practice, the new rules (proposed in Article 9 paras 1<sup>bis</sup> and 1<sup>ter</sup> of the Draft) would likely only be used in transactions where the merging parties have a lot of time for the closing deadline, which would allow them to accept a delay in the closing of a transaction by several weeks.
- 3.4 Based on the experience of the MWG's members, it is critical to have clear and easy-to-apply thresholds, as well as legal certainty with regard to the filing notification obligation. Uncertainties that can cause potential delays will incentivise some companies to choose to notify directly in Switzerland, and the resource savings contemplated by the exception not being realised by the parties or ComCo.
- 3.5 The International Competition Network (of which ComCo is a longstanding and active member) has issued Recommended Practices for Merger Notification and Review Procedures which indicate that filing thresholds should be based on objectively quantifiable criteria and based on readily accessible information (e.g. financial thresholds are preferred over market share thresholds because of the difficulties involved in determining markets and market shares before a review has been completed)<sup>4</sup>. The MWG considers that these principles are also relevant to exemptions from notification obligations.
- 3.6 The proposed notification exemption relies on an assessment of the relevant geographic market definition to determine if one of the markets is national in scope versus EEA-wide or broader). For many cases there will be no established precedent. This makes

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<sup>4</sup> See ICN Recommended Practices for Merger Notification and Review Procedures, Working Group Comments, Sections II.E and F, available at [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG\\_NPRecPractices2018.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf)

the ex ante assessment difficult and lacking in legal certainty for companies (and for ComCo).

- 3.7 The MWG understands that the Draft does not foresee the provision of a mechanism to obtain a fast and reliable ruling on the correct geographic scope of a particular market.<sup>5</sup> Furthermore, the determination of the notification obligation under the proposed exemption would become significantly more complex and costly. Having to verify all possibly affected markets (which in some cases may be several dozens or even hundreds of markets) requires an extensive analysis of all possible activities of the parties in Switzerland and the potentially relevant markets; and even if only one national market is defined, the obligation to notify remains.
- 3.8 In addition, the MWG notes that the possibility of the ComCo to revive the notification obligation at any point in time (given that there seems to be no fixed deadline for the authority) raises potential concerns. A revival of the reporting obligation would be based on a rough assessment by the authority (and this decision could not effectively be challenged), according to which at least one market may have to be defined nationally after all. Since there is no deadline for such a decision, the reporting obligation could be revived potentially weeks after submitting the Form CO to the ComCo, disrupting the timeline for closing of the transaction.
- 3.9 Based on the concerns described above, the MWG respectfully suggests to further clarify the procedure, including an early deadline for any action by ComCo to deny the exemption, and establishment of a swift and binding pre-ruling mechanism on the exemption from the notification obligation.

#### **4. Introduction of the SIEC test**

- 4.1 The Draft suggests to replace the current material "qualified dominance test" with the Significant Impediment to Effective Competition test ("SIEC" test), which is used in the EU and certain other jurisdictions.
- 4.2 In general, the MWG welcomes convergence of principles and tests across jurisdictions. However, it would be considerably more helpful if the Draft were to clarify that the test is in fact to be applied in the same manner as in the EU. More specifically, it is suggested that the new law or the accompanying message by the Federal Council clarify the role of EU SIEC precedents when applying the text in Switzerland and that there will be no additional "Swiss Finish". This will allow notifying parties to rely on the extensive EC case law and practice in this respect.
- 4.3 The MWG also respectfully submits that the introduction of the SIEC test should not lower the threshold for intervention in general, but only cover the so-called "gap" cases, i.e. cases of unilateral effects below the market dominance threshold.
- 4.4 In addition, in light of the fact that the ComCo will have significant discretion when applying the SIEC test, the MWG respectfully suggests that it would be appropriate to provide some (ideally binding) guidance on the future interpretation and application of

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<sup>5</sup> Opinions by the Secretariat of the ComCo are, so far as the MWG understands, not available within short periods of time (1-2 weeks) and are not binding for the ComCo.

the new test, or to indicate whether the guidance available in the EC is also fully applicable in Switzerland.

## **5. Extension of deadlines**

- 5.1 The proposed Draft introduces the possibility to extend the time limit in merger control proceedings, which would allow the alignment of the time limit with procedures of the EC. The MWG notes that the timing of the EC procedure is by international standards already long on average, in particular at Phase 2 and also in the potentially lengthy pre-filing consultation process. The result of this change is likely to make many merger reviews longer and less efficient in Switzerland.
- 5.2 Generally, national competition authorities make their own decisions on their own timelines and the merging parties typically take into account those timelines in their transaction planning and the implementation of merger filings. An alignment with other jurisdictions that involves slowing down, rather than speeding up, only seems useful where there is an actual need to coordinate substantively (e.g. for the coordination of merger remedies in supra-national markets). Insofar as the ComCo is reviewing and assessing specific issues in markets within Switzerland, there normally would be no need or justification to delay in order to achieve alignment, given that the ComCo can decide such matters itself.
- 5.3 Therefore, the MWG respectfully submits that the possibility to extend the time limit should only be applicable in specific and limited situations with an objective reason to coordinate procedures such as for merger remedies that have multi-jurisdictional aspects or where requested by the merging parties to achieve alignment.

## **6. Entry into force and retroactive application**

- 6.1 The MWG notes that according to Article 62 para. 1 of the Draft, the new Cartel Act would be applicable to all notifications made after the new law has entered into force. We assume that this refers to the submission of the complete notification. In the MWG's experience, the date at which a notification is considered by the ComCo to be complete can sometimes be affected by factors outside of the control of the merging parties. For example, the competition authority could request extensive pre-notification communications, which delay the completeness of the notification. The MWG suggests that the date of the signing of a transaction is a more appropriate and objective point in time in order to determine which rules should be applicable to the transaction.
- 6.2 The MWG therefore recommends an amendment to Article 62 para. 1 of the Draft Cartel Act to reflect this change.

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