



INTERNATIONAL BAR ASSOCIATION

ANTITRUST SECTION

**COMMENTS TO THE STATE SECRETARIAT FOR ECONOMIC AFFAIRS
(SECO), ECONOMIC POLICY DIRECTORATE, SWITZERLAND, REGARDING:**

**REVISION OF THE ORDINANCE ON SANCTIONS IMPOSED FOR UNLAWFUL
RESTRAINTS OF COMPETITION (CARTEL ACT SANCTIONS ORDINANCE,
CASO)**

AND

**DRAFT TOTAL REVISION OF THE ORDINANCE ON THE CONTROL OF
CONCENTRATIONS OF UNDERTAKINGS (MERGER CONTROL ORDINANCE,
MCO)**

September 17, 2026

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THE REVISION OF THE CARTEL ACT SANCTIONS ORDINANCE AND THE
MERGER CONTROL ORDINANCE**

1. Introduction

The International Bar Association's ("IBA") Antitrust Section ("Section" or "we") is making the following submission in relation to the revision of the ordinances implementing the revised Swiss Cartel Act, which was opened for public consultation on 27 May 2026. The submission has been prepared by the Merger Working Group, the Cartels Working Group, and the Unilateral Conducts Working Group of the Section (the "Working Groups"). For convenience, references to the Section refer to the Working Groups and their members. The submission addresses two of the draft ordinances: the draft revision of the Ordinance on Sanctions imposed for Unlawful Restraints of Competition (Cartel Act Sanctions Ordinance, "CASO") (the "draft CASO"), published by the State Secretariat for Economic Affairs, and the preliminary draft of the totally revised Ordinance on the Control of Concentrations of Undertakings (Merger Control Ordinance, "MCO") (the "Draft MCOU"), published by the Federal Department of Economic Affairs, Education and Research.

Part A hereafter sets out the comments of the Section on the draft CASO. While the draft CASO also includes the revision of other parts of the CASO, the Section focuses its comments on the **compliance defence** aspects (section 3 hereafter) and the **voluntary damages payments** aspects (section 4 hereafter) and only briefly touches upon other parts of the draft CASO (section 5 hereafter).

Part B hereafter sets out the comments of the Section on the Draft MCO. The Section limits its comments to selected aspects of the Draft MCO which, based on the international experience of its members, are of particular importance for the effectiveness and efficiency of the revised Swiss merger control regime.

The Section remains at the disposal of the State Secretariat for Economic Affairs to discuss any of the comments made hereafter.

2. About the IBA

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.¹

The IBA's Antitrust Section includes competition law practitioners around the world, including Switzerland, with a wide range of jurisdictional backgrounds and professional experience in merger control, as well as cartel and unilateral conduct issues. 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 on various aspects of competition law and policy.² It has prepared numerous submissions to governments and competition agencies around the world, including its comments of 18 March 2022 on the partial revision of the Swiss Cartel Act.³

¹ See <https://www.ibanet.org/>.

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

³ See <https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/WorkingGroupSubmissions.aspx#filter=.mergers>. See in particular the Section's Comments regarding the Partial Revision of the Cartel Act (2022), dated 18 March 2022.

PART A

COMMENTS OF THE IBA ANTITRUST SECTION ON THE REVISION OF THE ORDINANCE ON SANCTIONS IMPOSED FOR UNLAWFUL RESTRAINTS OF COMPETITION (CARTEL ACT SANCTIONS ORDINANCE, CASO)

1. Compliance defence (Art. 6 para. 1 lit. c draft CASO: Mitigating circumstances)

Pursuant to Art. 49a para. 1 fifth sentence of the revised Cartel Act (“revCartA”), measures taken by a company to prevent competition law breaches, which **are proportionate to its size, business activities and sector**, may be taken into account as mitigating factors when calculating a fine. The Federal Council has been tasked with setting the criteria for assessing the adequacy of the compliance measures in line with the legal framework established by the revCartA.

The draft CASO contains the criteria for the assessment of the appropriateness of the compliance measures in relation to the aforementioned parameters (*i.e.*, size, business activities and sector). Whilst the draft CASO does address these parameters (specifically in nos. 1 and 4 of Art. 6 para. 1 lit. c draft CASO), Art. 6 para. 1 lit. c nos. 2, 3, 6 and 7 draft CASO additionally introduce independent cumulative requirements which have no basis in the wording of the revCartA.

The draft CASO, therefore, **narrows the scope of application of the compliance defence** as provided for by the revCartA. The additional criteria set out in the draft CASO for its application are also significantly more restrictive than the current Federal Supreme Court practice.

The Section, therefore, takes the view that the criteria for the compliance defence established by the CASO should be less restrictive and in line with its legal basis. In addition, the setting out of numerous “formulaic requirements” when deciding if a compliance programme should be credited is also not in line with international practice which regularly allows for a more case-by-case assessment of a compliance programme’s effectiveness.

For these reasons, the Section suggests that the requirements set out in the draft CASO are amended and thereby aligned with international practice as outlined hereafter:

1.1 Art. 6 para. 1 lit. c no. 1 draft CASO: Compliance with industry standards and taking into account size and activities of the company

The draft CASO requires that the compliance programme takes the size and the business activities of the undertaking concerned into account and that it complies with industry standards. The case-by-case assessment of the compliance program, on the basis of the size and activities of the undertaking and the industry it competes in is in line with

international practice (Canada,⁴ Spain⁵, Austria⁶, the USA⁷ or Indonesia, for example, either explicitly or implicitly require coherence with these criteria) and therefore welcomed by the Section.

However, the term “industry standards” provides no fixed benchmark. The Section considers the notion of “industry standards” in the draft CASO to be too vague and is concerned that this undefined requirement may create legal uncertainty for companies.

The Section, therefore, suggests that **compliance with external industry standards should not be a mandatory requirement in the CASO**, provided that the compliance programme actually implemented by the undertaking concerned is commensurate with its size and business activities and the compliance risks given in the industry it operates in.

1.2 **Art. 6 para. 1 lit. c no. 2 draft CASO: Introduction prior to the opening of an investigation**

The draft CASO requires that the compliance programme must have been introduced prior to the opening of an investigation by the Competition Commission (“COMCO”).

Based on the experience of the Section members, a compliance programme introduced during the proceedings may also show that a company is taking responsibility for the conduct and is remedying its behaviour. The Section is therefore of the view that it should be possible for COMCO to consider such a compliance programme in its own right as a ground for a reduction of the sanction.

⁴ See Competition Bureau Canada, Core principles of a credible and effective compliance program, available at: <https://competition-bureau.canada.ca/en/how-we-foster-competition/compliance-and-enforcement/core-principles-credible-and-effective-compliance-program> (last accessed on 2 September 2026).

⁵ See Art. 64(3) Spanish Competition Act 15/2007; Spanish National Markets and Competition Commission (“CNMC”), Guidelines on Antitrust Compliance Programmes (9 June 2026), paras. 15, 24, 38 *et seq*; available at: <https://www.cnmc.es/sites/default/files/6637265.pdf> (last accessed on 2 September 2026).

⁶ In Austria, the Bundeswettbewerbsbehörde (“BWB”) Brochure on Competition Law and Compliance explicitly recommends that compliance programmes be proportionate and risk-based, without mandating compliance with external industry benchmarks, see BWB, Kartellrecht und Compliance, 2nd ed. 2023, pp. 6 and 16; available at: https://www.bwb.gv.at/fileadmin/user_upload/KARTELLRECHT_COMPLIANCE_2._Auflage_2023_Barrierefrei.pdf (last accessed on 2 September 2026).

⁷ See DOJ, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (ECCP Guidelines), 2024, p. 3 *et seq*; available at: <https://www.justice.gov/atr/media/1376686/dl> (last accessed on 2 September 2026).

On a comparative note, other jurisdictions such as Austria⁸, Spain⁹ or the USA¹⁰ do not consider it necessary that the compliance programme pre-dates the infringement itself or that it is presented prior to the official opening of the infringement procedure. They also give credit for post-discovery introduced/improved compliance programmes. In the USA, remedial efforts by a company after the commencement of the investigation to implement an adequate and effective corporate compliance programme or to improve the existing one are also considered¹¹.

The position is broadly consistent in South-East Asia. In Indonesia, for instance, it is required that a compliance programme be registered with the authority in order for a company to benefit from a fine reduction, but does not mandate that the programme pre-dates the opening of an investigation¹². Registration may occur at any time.

Since remedial efforts can show that a company is taking responsibility for the conduct and since the consideration of such efforts could further promote future deterrence from anticompetitive behaviour, the Section respectfully suggests that the CASO follows the approach of the jurisdictions set out above and **eliminates the criteria in Art. 6 para. 1 lit. c no. 2 draft CASO**.

1.3 Art. 6 para. 1 lit. c no. 3 draft CASO: Detection or remediation of the infringement through the compliance programme

The Section is particularly concerned about Art. 6 para. 1 lit. c no. 3 draft CASO which requires that the compliance programme must either have led to the disclosure of the infringement to the competition authorities or to its remediation.

The members of the Section note that this additional requirement may not be fully consistent with current Federal Supreme Court jurisprudence and the intention of the legislature. It is particularly restrictive and may give rise to concerns.

In the experience of the members of the Section, individual employees may still infringe cartel law provisions by deliberately and systematically circumventing all the suitable precautions taken by the company to prevent such unlawful acts and there are limits to the ability of even the most compliance minded company to monitor the activities of their employees. Data protection, privacy and employment law considerations mean that companies do not enjoy the power to access personal devices or communications of their employees and limit other means of monitoring employee activities. In such scenarios, companies that have serious and suitable compliance programmes would not only still be

⁸ In Austria, the BWB Brochure on Competition Law and Compliance seems to suggest that pre-existing compliance programmes carry greater weight, but do not categorically exclude post-investigation programmes from consideration (see BWB, Kartellrecht und Compliance, 2nd ed. 2023, pp. 16 et seqq.).

⁹ See CNMC Guidelines on Antitrust Compliance Programmes, paras. 62-69.

¹⁰ See DOJ, ECCP Guidelines, 2024, p. 3.

¹¹ See DOJ, ECCP Guidelines, 2024, p. 2.

¹² See Indonesia Competition Supervisory Commission (Komisi Pengawas Persaingan Usaha (“KPPU”) Regulation No. 1 of 2022.

victims of their employees' anti-competitive behaviour, but also be unable to rely on a compliance defence.

Second, even where they are able to detect misconduct in a timely fashion, in many cases companies may reasonably disagree as to the characterization of that conduct as an infringement. As such, it appears wrong in principle to link objectively verifiable compliance efforts to leniency or voluntary disclosure, depriving companies of their rights of defence, when the benefits of both leniency and self disclosure are specifically provided for in the law.

Third, even where an infringement is clear, leniency or voluntary disclosure imply very substantial and disproportionate costs that can result, in terms of reputational impact, exposure to follow-on damages claims, commercial consequences and procurement-related effects. It is simply no longer the case that the ability to apply for leniency can be considered a "benefit" of a compliance program. Rather, the potential obligation to do so in order to receive an uncertain, limited credit is a huge handicap when seeking to obtain management buy in and commitment to a leniency program.

By contrast, predictable, standalone recognition for robust compliance efforts - independent of leniency or external disclosure - would incentivize companies to reinforce budgets, secure senior-management engagement, and shift compliance toward a sustainable preventive function, which in turn would reduce the enforcement burden of the authority.

A comparative analysis confirms that linking compliance credit to actual detection respectively voluntary disclosure or remediation is not in line with international practice.

In Canada, having a compliance programme in place can act as a mitigating factor under the leniency programme (whereas the programme does not necessarily have to have led to the self disclosure or to the infringement's remediation).¹³ To be considered as a mitigating factor, the compliance programme must be (i) credible, *i.e.* the programme must show the business' genuine commitment to obeying the law and competing fairly, and (ii) effective. To be considered effective, the programme must inform all employees of their legal duties and provide for internal compliance measures. It also has to provide for tools to prevent and detect misconduct.¹⁴ The Competition Bureau Canada also explicitly acknowledges that even if an employee violates his duties under a compliance regime, a compliance programme may still be considered as a mitigating factor.¹⁵

Under the Spanish CNMC guidelines of 9 June 2026, too, the consideration of a compliance programme as a mitigating factor does not require a voluntary disclosure. The only mandatory requirement is that the undertaking submits its programme to the

¹³ See Competition Bureau Canada, Specific areas of enforcement by the Bureau, available at: <https://competition-bureau.canada.ca/en/how-we-foster-competition/compliance-and-enforcement/specific-areas-enforcement-bureau#toc01-c> (last accessed on 13 August 2026).

¹⁴ See for more details Competition Bureau Canada, Core principles of a credible and effective compliance program.

¹⁵ See Competition Bureau Canada, Specific areas of enforcement by the Bureau.

authority at the start of the investigation phase and provides documented evidence of it. The compliance defence in Spain further merely requires a material connection between the programme and the company's cooperative or remedial behaviour during proceedings.¹⁶

In the USA, the key criteria is whether a compliance programme is effective. To determine an antitrust compliance program's efficacy, the authorities consider in particular whether the compliance programme addresses and prohibits criminal antitrust violations or whether the programme detected and facilitated prompt reporting of the violation. These elements are, however, mere evidence that the programme was effective, not formulaic requirements.¹⁷

In Germany, Note 3 to Section 14 of the Federal Cartel Office's 2021 Guidelines on Fines states that the effectiveness of pre-offence compliance is generally to be assumed if the measures in place led to detection and reporting. However, its effectiveness is not ruled out if the measures did not lead to detection solely because a person involved deliberately circumvented the compliance code by misleading their superiors.¹⁸ Furthermore, the German legal framework distinguishes between the leniency programme¹⁹ and the reduction of fines on the basis of compliance efforts²⁰ without any cross-references; compliance efforts are recognised independently of leniency status.

In Austria, compliance programmes containing effective detection and reporting mechanisms deserve credit.²¹

In Singapore, too, the Competition and Consumer Commission ("CCS") does not require that a compliance programme must have led to the actual detection or disclosure of the infringement in order to qualify as a mitigating factor. The CCS Guidelines on the Appropriate Amount of Penalty 2016 focus on whether the programme has appropriate policies and procedures in place, whether it has been actively implemented, and whether it is evaluated and reviewed at regular intervals. These are indicators of programme quality, not preconditions linked to detection outcomes. Similarly, in Indonesia, the mitigating factors under KPPU Regulation No. 2 of 2021 include undertaking activities which indicate efforts to comply with fair business competition principles, including

¹⁶ See CNMC Guidelines on Antitrust Compliance Programmes, paras. 65-69; In this regard, we also note that the CNMC explicitly changed their guidance on this point: the 2020 CNMC Guidelines explicitly required voluntary disclosure, a requirement that was removed following the consultation and publication of new guidelines earlier this year.

¹⁷ See DOJ, ECCP Guidelines, 2024, p. 4.

¹⁸ Bundeskartellamt, 2021 Guidelines on Fines, note 3 to para. 14, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Leitlinien/Bu%C3%9Fgeldleitlinien_Oktober2021.pdf?__blob=publicationFile&v=4 (last accessed on 2 september 2026).

¹⁹ §§ 81h et seq. GWB, Section 2.

²⁰ § 81d para. 1 second sentence, nos. 4 and 5 GWB, Section 1.

²¹ See BWB, Kartellrecht und Compliance, 2nd ed. 2023, p. 18..

through training, outreach and dissemination of information – without conditioning mitigation on actual detection or voluntary disclosure of the infringement.

Art. 6 para. 1 lit. c no. 3 draft CASO is therefore neither in line with current, established Swiss case law²² nor with international practice and, by requiring voluntary disclosure or mediation substantially undermines the incentives to invest in compliance efforts. The Section respectfully notes that this approach may not reflect the intention of the legislator, who sought to strengthen the compliance defence rather than to create new obstacles. The Section therefore respectfully proposes that **criterion 3 be deleted** or revised to refer to the requirement of “suitability” instead.

1.4 Art. 6 para. 1 lit. c no. 4 draft CASO: Allocation of resources

No. 4 of the draft CASO requires the companies to set out the resources necessary for implementation of the compliance programme in the programme itself.

On a comparative note, a requirement to allocate resources seems to be largely aligned with many international compliance guidelines (including for instance Austria²³, Spain²⁴ and the USA²⁵).

However, the members of the Section deem it necessary that the provision clarifies that adequacy of the resources allocated to the compliance programme is to be assessed on the basis of an *ex ante* analysis (i.e., before the antitrust violation has taken place). If the assessment would be done on an *ex post* basis, there is a high risk that antitrust infringement would be taken as proof of the lack of sufficient resources for the programme.

In addition, companies should not be required to specify the specific resource requirements *in the compliance programme itself*.

Finally, the Section submits that robust *ex ante* compliance efforts would be further encouraged if the CASO or authority committed to clear and transparent guidance on both the standards required to qualify for compliance credit and the evidence needed to demonstrate effectiveness (such as implementation reports, training metrics, and corrective measures etc.).

1.5 Art. 6 para. 1 lit. c no. 5 draft CASO: Risk identification and risk-mitigating measures

The draft CASO further requires that the compliance programme identifies and assesses the risk of unlawful restrictions on competition and sets out appropriate risk-mitigation measures, in particular training, reporting mechanisms, monitoring and disciplinary measures.

²² See Swiss Federal Supreme Court 2C_442/2023 vom 14. April 2025, E. 4.5.4.3.
²³ See BWB, Kartellrecht und Compliance, 2nd ed. 2023, p. 16.

²⁴ See CNMC, Guidelines on Antitrust Compliance Programmes, paras. 38 et seq.

²⁵ See DOJ, ECCP Guidelines, 2024, p. 8.

The Section notes that the requirement that the compliance program, its risk matrixes and measures are dynamic and calibrated to each company's sector and risk profile is in line with international practice.

The Section sees a risk, however, that a formal, documented risk analysis is too resource-intensive for smaller companies and that monitoring mechanisms may even infringe data protection and employment law provisions. In the Section's view, the **obligation of risk assessment** as well as the **monitoring obligations** should **not be included in the CASO**.

1.6 Art. 6 para. 1 lit. c no. 6 draft CASO: Independent Compliance Officer who reports directly to senior management

No. 6 of the provision requires an individual who is independent from a functional, organisational and personal perspective and who reports directly to senior management.

While the requirement of independence is, in principle, in line with international practice (for example, in Canada²⁶, Spain²⁷, the USA²⁸ and Singapore), the Section members wish to emphasise that no. 6 should make explicit reference to the principle of proportionality, taking into account in particular the interests of smaller companies.

In Spain, for instance, the assessment of the compliance officer's independence is made on a case-by-case basis. Independence is assessed by reference to the officer's real position within the organisation, the effective means available, the officer's protection against undue interference, their stability in the role and functional separation from risk-exposed areas, and sufficiency of resources commensurate with the company's size and risk profile.²⁹

Based on this, the Section recommends that the CASO does not mandate a specific organisational structure, but rather only provides for the compliance officer to have sufficient independence and authority, allowing for a case-by-case assessment of their independence based on the principle of proportionality.

1.7 Art. 6 para. 1 lit. c no. 7 draft CASO: No member of the governing body involved or aware

The draft CASO provides that the compliance defence is excluded if a member of the governing body was either involved in the infringement or had knowledge of it.

The Section notes that such a provision fails to distinguish between knowledge of a particular conduct and knowledge of a breach of competition law. If a certain business practice, of which a member of the executive body has knowledge, subsequently is qualified as impermissible due to an unforeseeable practice on the part of the competition

²⁶ See Competition Bureau Canada, Core principles of a credible and effective compliance program.

²⁷ CNMC Guidelines on Antitrust Compliance Programmes, para. 36.

²⁸ See DOJ, ECCP Guidelines, 2024, p. 7 et seq.

²⁹ CNMC Guidelines on Antitrust Compliance Programmes, para. 39.

authorities, the mere fact of the executive body's involvement or awareness of the conduct should not be held against the company.

Based on the Section members' experience, it is often very difficult for undertakings to foresee at the time of implementation of a conduct the future assessment of such conduct by competition authority, in particular if case law changes.

Moreover, while the Section accepts the importance of management buy in and "tone from the top", it submits that in practice the unauthorized acts of one individual, even a senior executive, are not inconsistent with the company having taken reasonable steps to ensure compliance, and by placing too high a bar for credit to be obtained companies may be discouraged from making the necessary investment in compliance efforts. On a comparative note, the requirement in no. 7 is also not in line with international standards. For example, while Canada emphasizes that compliance culture is set at the top, beginning with senior management, it does not explicitly require that no senior manager was involved with or had awareness of an infringement.³⁰ In the USA, the Department of Justice ("DOJ") also often allows for carving out of culpable senior leadership from corporate resolutions. Spain equally does not provide for an automatic categorical bar as is envisaged by the draft CASO. While the direct involvement of a senior manager in a serious or very serious infringement could determine (but not automatically) the ineffectiveness of the compliance programme, this is only the case where it can be concluded that the senior manager's participation excludes genuine commitment to compliance.³¹ This case-by-case assessment of the senior management's involvement allows for a more realistic analysis of a conduct in the context of the company's governance structure overall than an automatic bar. In Singapore, CCS likewise does not provide for an automatic exclusion of the compliance defence based on governing body involvement; senior management's role is assessed as part of the broader evaluation of programme effectiveness. In Indonesia, the KPPU's framework focuses on the quality of compliance efforts without an automatic bar tied to the awareness or involvement of any individual member of the governing body.

The Section therefore respectfully suggests that Art. 6 para. 1 lit. c no. 7 CASO should be **eliminated as a requirement** or at least include a clarification to the effect that only participation in, or knowledge of, a clearly recognizable breach of competition law precludes the compliance defence.

2. Voluntary damages payments (Art. 15 et seq. draft CASO: Reduction of the sanction on the basis of voluntary contributions)

Art. 15 of the draft CASO provides that a company may submit an application for a reduction of the sanction on the grounds of voluntarily paid compensation, voluntarily paid damages for non-pecuniary loss, or voluntarily surrendered unlawful gains. Based on Art. 49a para. 5 revCartA, COMCO or the appeal body then have the power to reduce the sanction imposed on the company concerned to an "appropriate extent" or order the reimbursement of an "appropriate portion" thereof.

³⁰ See Competition Bureau Canada, Core principles of a credible and effective compliance program.

³¹ CNMC Guidelines on Antitrust Compliance Programmes, para. 21.

The Section welcomes that the draft CASO recognizes voluntary damage payments among the mitigating circumstances. It also welcomes that the revCartA anchors a deliberately open, unquantified discretionary standard. The members of the working group note with concern, however, that Art. 16 para. 1 and 2 lit. a and b of the draft CASO introduce maximum percentage rates for the reduction as well as time limits that may not be supported by the wording of Art. 49a para. 5 revCartA.

The Section respectfully submits that the revCartA may not provide a sufficient basis for such a specification of the scope of discretion. On a comparative note, the Section wishes to point out that the draft CASO, by fixing precise percentage caps and introducing a two-tier structure based on the conclusion of evidentiary proceedings, deviates from international practice.

In other jurisdictions, such as Austria, Canada, Spain³² or the Netherlands³³ (when applying mitigating circumstances), the competition authority retains full discretion as to the weight accorded to voluntary contributions. In addition, jurisdictions such as the Netherlands, refrained from creating an explicit, binary timing incentive tied to a specific procedural milestone, and provide for a more case-by-case approach to timing and give credit for compensation arranged also after the original fine decision, during objection or appeal.

The members of the Section therefore respectfully submit that the draft CASO is not consistent with the scope of discretion chosen by the legislature and would benefit from amendment as outlined hereafter:

2.1 Art. 16 para. 1 draft CASO: Offsetting of a maximum of 50 % of the fine

The draft CASO provides for the general rule that the fine will only be reduced by a maximum of 50 % (Art. 16 para. 1). The reasons provided for this rule in the Explanatory Report – in particular the punitive, repressive, and preventive nature of the sanction, which goes beyond its compensatory elements as well as damages that cannot be quantified or attributed to specific individuals – do, in the Section’s view, not support a fixed maximum rate that is uniform across all cases.

The Explanatory Report itself shows that the relative weight of the punitive and preventive elements varies from case to case. A fixed rate of 50 % cannot reflect this variability. By using the term “reasonable”, the legislature has specifically entrusted the authority with the task of assessing this balance on a case-by-case basis. The Section respectfully notes that Art. 16 para. 1 draft CASO may not leave sufficient room for the case-by-case assessment envisaged by the legislature. The Section, therefore, respectfully **submits to eliminate the respective 50 % threshold.**

³² See art. 64 para. 3 let. c of Spain’s Antitrust Law (Ley 15/2007 de Defensa de la Competencia or (“LDC”).

³³ Articles 2.8, 2.10 ACM’s 2014 Fining Policy Rule, available at: <https://wetten.overheid.nl/BWBR0035322/2023-11-09?g=2023-11-09&z=2023-11-09> (last accessed on 2 september 2026).

2.2 **Art. 16 para. 2 lit. a draft CASO: Offsetting of a maximum of 60 % of the voluntary contributions**

In addition to Art. 16 para. 1, the draft CASO provides in Art. 16 para. 2 lit. a that the reduction in the sanction shall not exceed 60 % of the voluntary contributions payable to the injured parties, provided that the obligation to pay and the receipt of the relevant application (Art. 15 draft CASO) occur before the conclusion of the evidentiary proceedings at first instance.

The Section submits that – besides its lack of a legal basis in the revCartA – such a restriction creates a disincentive of its own. Since only 60 % of the voluntary contributions are taken into account, the company concerned bears an uncovered portion of its contribution of at least 40 %. It is clear that this weakens rather than strengthens the incentive to provide compensation to injured parties. In addition, the members of the Section do not consider the percentage limitation to solve the problem of (excessive) voluntary contributions to persons without a legitimate claim, as the Explanatory Report suggests.

The Section **recommends to delete the flat-rate reduction in Art. 16 para. 2 draft CASO** and to adopt an approach to assess the legitimacy of each claim on a case-by-case basis instead.

2.3 **Art. 16 para. 2 lit. b draft CASO: Offsetting of a maximum of 30 % of the voluntary contributions**

Art. 16 para. 2 lit. b draft CASO holds that the sanctions reduction shall not exceed 30 % of the voluntary contributions payable to the injured parties, if the conditions set out in lit. a are not met, *i.e.* if the obligation to make the payment or the application is made only after the conclusion of the evidentiary proceedings at first instance.

According to the Explanatory Report, the limitation to 30 % is justified on the grounds that, from this point onwards in the proceedings, the voluntary nature of the contributions is limited since COMCO's assessment is known, which allegedly increases the likelihood that the relevant contributions would in any case be enforced under civil competition law in the context of civil damages claims.

The Section notes that this assumption is not rooted in the reality of Swiss cartel civil procedure respectively practice. Unlike in other jurisdictions, allegedly injured parties face considerable procedural and cost-related hurdles in civil proceedings in Switzerland. There is only a limited body of case law in Switzerland, which is likely due to the fact that especially consumers and SMEs may be deterred from bringing a claim due to these hurdles. The Section is of the opinion that the current approach in the draft CASO may not sufficiently account for the fact that the likelihood of a successful follow-up civil lawsuit does not necessarily increase due to COMCO's decision. Already for this reason, the **Section respectfully suggests deleting the further limited flat-rate reduction in lit. b** of the provision as well.

In addition, Art. 16 para. 2 lit. b draft CASO significantly weakens the financial incentive for a voluntary contribution since the company concerned can only recover 30 % of its contributions.

The Section respectfully notes that the current approach in the draft CASO may have the unintended effect of making the simpler route of voluntary compensation more difficult for injured parties, while the instrument was introduced by the legislature specifically for their benefit.

2.4 Conclusions

In conclusion, the rigid rules provided by the draft CASO do not appear to have an appropriate basis in the wording of Art. 49a para. 5 revCartA or in international practice and risk disincentivising the companies concerned from compensating injured parties as effectively as possible. In the light of this, the Section respectfully recommends deleting the fix percentages and – most importantly – the time limits introduced in Art. 16 para.1 and 2 lit. a and b draft CASO and to allow for a discretionary assessment of the reduction based on the open criteria set out in Art. 16 para. 3 draft CASO (with the exception of the criteria of the time of the payment for the reasons outlined above).

3. Comments on further aspects of the draft CASO

3.1 Art. 3 paras. 2 and 3 draft CASO: Calculation of fine

The newly introduced paras. 2 and 3 of Art. 3 draft CASO lead to a considerable extension of the basis for the calculation of the base amount of the fine, which finds no grounds in the revised CartA. Therefore, the exceptions to the principles laid down in para. 1 should be construed narrowly and para. 2 should clearly state that it applies *only exceptionally* if the base amount calculated according to para. 1 *obviously* does not reflect the economic relevance of the infringement.

In addition, the exception in para. 2 should be limited to the cases outlined in lit. a (no turnover in the relevant markets in the past 3 years) and lit. b (generation of reduced turnover as a result of the violation in the relevant markets). The exception provided for in para. 2 lit. c, as well as the possibility currently foreseen in para. 3 lit. a, should be eliminated, as nearly all infringements could have an impact on markets other than the relevant markets, such as upstream or downstream markets.

In conclusion, the Section **respectfully submits that para. 2 lit. c as well as para. 3 lit. a should be eliminated** from the draft CASO.

3.2 Art. 7 draft CASO: Maximum fine

Art. 49a para. 1 CartA provides for a maximum fine of 10 % of the turnover achieved in the past three business years in Switzerland. Art. 7 para. 2 draft CASO now provides that this maximum penalty is to be determined separately for “each violation”.

In the view of the Section, this proposal raises significant concerns since a situation may arise where a single set of facts that satisfy multiple elements of a provision could be characterized as multiple violations simultaneously and then, under Art. 7 para. 2 draft CASO, a maximum penalty of 10 % could be set separately for each of these offenses.

Such situations could typically arise in market dominance cases as well as in horizontal cartel cases. Classic examples relate to cases of abuse of market power. COMCO regularly considers multiple elements of Art. 7 para. 2 CartA to be fulfilled by the same

conduct. Similarly, bid-rigging agreements may simultaneously constitute an agreement to fix prices and volumes and allocate customers.

This contradicts Art. 49a para. 1 CartA, which provides for a uniform, turnover-based upper limit for the undertakings concerned. Under Art. 7 para. 2 draft CASO, this maximum sanction could, under certain circumstances, be multiplied, even though the set of facts under investigation is the same or stems (originally) from the same investigation.

Similar approaches are taken on an international level.³⁴ Therefore, the Section **respectfully suggests that Art. 7 para. 2 CASO is deleted without replacement.**

3.3 Art. 21 draft CASO: Opposition procedure

Art. 21 para. 2 draft CASO limits the exemption from sanctions to the “conduct described in the notification”, whilst the COMCO Secretariat is not required to examine of its own motion whether the documents submitted contain “additional restrictions on competition”.

The Section is concerned that the provision may be too ambiguous and entail the risk that COMCO relies on the possible (legal) assessment of the facts provided by the notifying company instead of assessing the described facts in their entirety. The members of the Section wish to emphasise that the (legal) assessment and classification of the facts is the responsibility of COMCO, not the one of the notifying companies.

The Section, therefore, submits that Art. 21 para. 2 CASO needs to ascertain that the exemption from sanctions is based on the facts as described in the notification and is not limited to the parties’ (legal) assessment of those facts.

The Section therefore **respectfully suggests** enhancing clarity for companies by **amending the wording** of the draft provision, for example, as follows:

“The undertaking shall be exempt from sanctions ~~only~~ in respect of the facts described in the notification. The legal qualification of the facts by the notifying undertaking has no relevance for the scope of the exemption. ~~The Secretariat shall not examine of its own motion whether the documents submitted contain additional restrictions on competition.”~~

³⁴ In Singapore for instance, section 69(4) of the Competition Act provides for a statutory maximum penalty of 10 % of the turnover of the undertaking’s business in Singapore for each year of infringement, up to a maximum of three years. However, this cap applies per undertaking and not per infringement. In Indonesia, KPPU Regulation No. 2 of 2021 limits fines to a maximum of 50 % of the net profit of the business actor in the relevant market throughout the period of the violation, or 10 % of total sales in the relevant market during the same period, again on a per-undertaking rather than a per-infringement basis. In Cambodia, fines range from 3 % to 10 % of the total turnover, limited to three years, without provision for per-infringement multiplication. The possibility under Art. 7 para. 2 draft CASO of applying the 10 % cap separately to each violation is therefore also out of step with emerging competition enforcement frameworks in South-East Asia.

PART B

COMMENTS OF IBA ANTITRUST SECTION ON THE DRAFT TOTAL REVISION OF THE ORDINANCE ON THE CONTROL OF CONCENTRATIONS OF UNDERTAKINGS (MERGER CONTROL ORDINANCE, MCO)

1. General remarks

The Section welcomes the revision of the MCO implementing the revised Cartel Act, and in particular the introduction of the SIEC test, which brings the substantive assessment of concentrations in Switzerland into line with the test applied in the EU and many other jurisdictions. As stated in its 2022 submission, the Section generally welcomes convergence of principles and tests across jurisdictions, provided that such convergence delivers legal certainty and does not result in an additional “Swiss finish”. The comments below are made in this spirit.

In this regard, the Section notes that, where the Swiss legislator has chosen to adopt a test modelled on the EU standard, it is in the interest of legal certainty and international consistency that the Swiss authorities take into account the well-developed evidentiary standards applied in practice under that test. In particular, the EU Courts’ judgment in *CK Telecoms* (C-376/20 P) – which confirmed that the authority bears the burden of establishing a significant impediment to effective competition on the basis of cogent and consistent evidence, without recourse to structural presumptions of harm – provides a useful point of reference for the development of Swiss practice under the new test.

2. Turnover allocation for joint ventures (Article 5 paras. 4 and 5 Draft MCO)

Article 5 para. 4 of the Draft MCO provides that, where an undertaking concerned exercises joint control over a joint venture together with a third party not concerned by the transaction, the turnover of that joint venture is to be attributed in full (100%) to the undertaking concerned. This departs both from the established Swiss turnover allocation practice and from EU law, under which the turnover of a joint venture between an undertaking concerned and a third party is allocated per capita among the controlling undertakings.³⁵

The Section sees no justification for such a divergence. International transactions account for the large majority of concentrations notified in Switzerland, and for such transactions it is of central importance that turnover is calculated on the same basis in the EU and in Switzerland. Diverging allocation rules would create additional work and inconsistencies in the preparation of merger notifications. More importantly, they would increase the risk of inadvertent breaches of the Swiss notification obligation: transactions that are notifiable in Switzerland only as a result of the broader turnover attribution under Article

³⁵ Council Regulation (EC) No 139/2004 (“EUMR”), Article 5(5)(b), and Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, p. 1, para. 187.

5 para. 4 of the Draft MCO may be overlooked where the parties assess their filing obligations on the basis of the (narrower) EU turnover calculation.

The Section therefore respectfully suggests that the current turnover allocation rule be retained. Accordingly, the *pro rata* allocation rule set out in Article 5 para. 5 of the Draft MCO (which applies where the joint venture is jointly controlled by undertakings concerned) should equally apply where an undertaking concerned exercises joint control over a joint venture together with a third party, in line with EU practice.

3. Significant impediment to effective competition and efficiencies (Article 8 Draft MCO)

The Section respectfully submits that Article 8 of the Draft MCO should be deleted. The explanatory report presents the introduction of the SIEC test as an alignment of the Swiss review standard with that applied in the EU and in most EU Member States. In its 2022 submission, the Section welcomed that convergence, but suggested clarifying that the test would be applied in the same manner as in the EU – allowing notifying parties to rely on the extensive EU case law and decisional practice – and that there would be no additional “Swiss finish”. Article 8 of the Draft MCO undermines that objective in two respects. As the Section stated in its submissions to the European Commission on the draft EU Merger Guidelines (September 2025 and June 2026), guidelines – not binding legislative instruments – are the appropriate vehicle for articulating the analytical methodology for the substantive merger test, since they allow for evolution in light of case law and economic learning.

First, Article 8 diverges from the EU standard through its choice of instrument. Under the EU model, the SIEC test is stated in Article 2(2) and (3) EUMR in two sentences; the matters Article 8 seeks to address – the manifestation of competitive harm, the mechanisms through which it arises, the assessment of significance, and the treatment of efficiencies – are addressed in Commission guidelines, that is, in revisable interpretative guidance framed by the case law of the EU Courts. Those guidelines are currently being comprehensively recast; codifying a snapshot of merger analysis in a binding ordinance at this moment would freeze the Swiss framework while the reference framework evolves, and would make divergence structurally inevitable.

The Section notes that the European Commission’s draft Merger Guidelines (published 30 April 2026 for public consultation) articulate no fewer than eight distinct theories of harm across more than 300 paragraphs of detailed guidance, supported by extensive references to decisional practice and EU Court case law. This comparison illustrates the inherent challenge of articulating the substance of SIEC analysis within the confines of a necessarily much shorter binding ordinance provision.

Second, Article 8 diverges from the EU standard in substance. Article 8 para. 1 defines the impediment by reference to three outcome parameters (price, quality and innovation efforts), whereas the EU test protects the competitive process by reference to a deliberately open set of price and non-price parameters. If the enumeration in Article 8 para. 1 is exhaustive, the Swiss test is narrower than the EU test; if it is illustrative, the provision provides no interpretative assistance. Article 8 para. 2 enumerates three mechanisms where the draft EU Merger Guidelines articulate eight theories of harm, and folds non-coordinated oligopoly effects – the historic rationale for the SIEC test – into a single letter together with coordination. Article 8 para. 3 compresses into one sentence a

significance and evidentiary standard that EU law derives from settled jurisprudence, most recently CK Telecoms (C-376/20 P); once enacted as autonomous ordinance text, it would be interpreted independently of that jurisprudence. Article 8 para. 4, finally, carries the same closed triad into the efficiency assessment and is thereby narrower than the corresponding EU framework, notwithstanding that fuller recognition of efficiencies was a principal motivation for the reform. In its June 2026 submission to the European Commission, the Section strongly supported the recognition of dynamic efficiencies – including sustainability, resilience and security-of-supply benefits – and the abandonment of rigid time horizons for the realisation of benefits; Article 8 para. 4 of the Draft MCO, by contrast, forecloses such broader recognition.

The Section does not consider that this narrowness would assist the authority and the merging parties: it is not enforceable *ex ante*, while adding, for the international transactions that characterise Swiss practice, a divergent second substantive analysis alongside EU review. Consistent with its 2022 submission, the Section therefore respectfully suggests that Article 8 be deleted and that any elaboration of the test be left to guidance of ComCo informed by EU practice.

In the alternative, Article 8 should be reduced to a provision confirming that Article 10 nKG is to be applied taking due account of the practice under Article 2 EUMR – which would at the same time implement the clarification the Section called for in its 2022 submission. In either scenario, any implementing guidance would benefit from drawing on the principles that have emerged from international practice under the SIEC test, including in particular: (i) the principle that there should be no general presumption that a concentration is incompatible with the requirements of effective competition – a principle reflected, by way of comparison, in the EU Courts’ judgments in CK Telecoms (C-376/20 P, para. 71) and Kali & Salz (Joined Cases C-68/94 and C-30/95, para. 222); (ii) the assessment of coordinated effects by reference to rigorous criteria analogous to those applied in Airtours (T-342/99); (iii) vertical foreclosure analysis conducted under a structured ability–incentive–effect framework; and (iv) a genuine prospect for efficiencies to be outcome-determinative, including through fixed-cost savings and innovation benefits extending beyond a rigid short-term horizon.

4. Content of the notification (Article 10 Draft MCO)

Article 10 of the Draft MCO redefines the content of the notification. Beyond implementing the revised Cartel Act, it contains several extensions of the information requirements which, in the Section’s view, should be reconsidered.

4.1 Article 10 para. 1 lit. a–c (corporate structure)

The information required under lit. a–c largely corresponds to what is already submitted in current practice. However, according to the explanatory report (p. 8), the undertakings concerned would, beyond the group structure, also have to disclose non-controlling minority shareholdings – such as cross-shareholdings of less than 50% – insofar as these may have an influence on effective competition.³⁶ Such an open-ended disclosure

³⁶ Explanatory Report on the Draft MCO, p. 8, according to which, beyond the group structure, minority shareholdings (such as cross-shareholdings of less than 50%) are to be disclosed insofar as they may have an influence on effective competition.

obligation would create considerable uncertainty as to the required scope of a notification, in particular in international transactions, e.g. with private equity funds. The Section respectfully suggests clarifying that the required corporate structure information is limited to the group in the competition law sense, *i.e.*, to entities controlling, controlled by, or under common control with, the undertakings concerned, and that minority shareholdings need only be disclosed insofar as they concern undertakings active in the markets affected by the transaction – in line with the approach under the EU Form CO.

Moreover, the ICN Recommended Practices provide that initial notification requirements should be confined to the information necessary to enable the authority to determine whether a transaction merits further examination, and should not impose disproportionate costs on the merging parties or on the reviewing authority.

4.2 Article 10 para. 1 lit. d (market definitions and market shares)

Lit. d would require notifying parties to provide, for all markets on which even only one undertaking concerned is active and which cover at least parts of Switzerland, all plausible product and geographic market definitions together with market share estimates, irrespective of whether those markets are in any way affected by the transaction. For the competitive assessment of a concentration, however, only the actually affected markets are relevant. Requiring all plausible market definitions and market share estimates for potentially hundreds of unaffected markets (for example, all portfolio company activities of financial investors acquiring joint control over an unrelated target) would impose a very significant administrative burden and cost on the parties and on ComCo, without any corresponding benefit for the assessment.

Such a requirement would also be out of line with international practice. In EU merger control procedures, market definitions and market share data are required in the Form CO only for the affected markets, *i.e.*, markets with horizontal overlaps (combined share of 20% or more) or vertical relationships (share of 30% or more); there is no requirement to provide market definitions (let alone all plausible alternative definitions together with market share estimates) for every market on which only one of the parties is active, irrespective of any overlap or relationship with the transaction.³⁷

Notably, the explanatory report itself acknowledges that the effort of estimating market shares for all plausible market definitions can be considerable and refers the parties to case-by-case waivers – which, in the Section’s view, confirms that the standard requirement is drawn too broadly. The Section respectfully suggests retaining the current wording, which limits such information to the affected markets. This approach would also be consistent with the principle, articulated in the Section’s June 2026 submission to the European Commission, that meaningful screening criteria and safe harbours – including the 20% horizontal overlap and 30% vertical relationship thresholds – serve the essential function of *ex ante* predictability and should not be eroded.

The proposed expansion of the information requirements would also run counter to the broader trend in the EU towards reducing the information burden for unproblematic cases. The 2023 Commission Notice on the simplified procedure defines certain

³⁷ Commission Implementing Regulation (EU) 2023/914 of 20 April 2023, OJ L 119, 5.5.2023, p. 22, Annex I (Form CO), in particular Sections 6–8.

categories of cases eligible for simplified treatment. For two of these categories – joint ventures without activities in the EEA (point 5(a)) and transactions without any horizontal or vertical relationships (point 5(c)) – the Notice provides for a “super-simplified” treatment: only the relevant sections of the Short Form CO need to be completed, the parties are invited to notify directly without pre-notification contacts, and such cases are typically decided well within the ordinary 25-working-day period.³⁸

Whereas the EU framework thus calibrates the information requirements to the risk profile of the transaction – and continues to reduce them for cases that manifestly raise no concerns – the Draft MCO would move in the opposite direction by expanding the standard information requirements for all notifications. The ICN Recommended Practices, to which ComCo has subscribed as a longstanding and active member of the ICN, likewise provide that initial notification requirements should be limited to the information necessary to determine whether a transaction raises competitive concerns, and should not impose unnecessary burdens on the merging parties.³⁹

4.3 Article 10 para. 1 lit. e (detailed market descriptions)

According to the explanatory report (p. 9), the detailed market descriptions under lit. e are intended to extend to upstream, downstream and neighbouring markets, including markets which are not affected markets and on which the undertakings concerned are not (yet) active.⁴⁰ To the extent that conditions on such markets are relevant, they already form part of the description of the affected markets under current practice. Requiring stand-alone descriptions of such markets would merely increase the administrative burden without adding value to the review. The Section respectfully suggests that the information under lit. e remain limited to the affected markets – as, indeed, the thresholds in lit. e nos. 1 and 2 of the draft wording themselves suggest, in contrast to the explanatory report.

4.4 Article 10 para. 1 lit. f (documents)

The current rule, under which only documents prepared in view of the concentration are to be submitted to the extent they contain information important for the assessment, has proven workable in practice. The Section suggests retaining this qualification.

4.5 Waiver mechanism (Article 9 para. 4 and Article 10 para. 4 Draft MCO)

The possibility for parties to agree on waivers with the Secretariat on a case-by-case basis is welcome but is no substitute for reasonable, proportionate, and clearly delimited

³⁸ Commission Notice on a simplified procedure for treatment of certain concentrations, OJ C 160, 5.5.2023, p. 1; see points 5 (categories of simplified treatment), 8–9 (flexibility clauses), 11–24 (safeguards and exclusions) and 26 (super-simplified treatment).

³⁹ See ICN Recommended Practices for Merger Notification and Review Procedures, Sections II.E and F and V, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

⁴⁰ Explanatory Report on the Draft MCO, p. 9: the information is to be submitted “nicht nur für die betroffenen Märkte, sondern auch für vorgelagerte, nachgelagerte und benachbarte Märkte”, including where the undertakings concerned are not active on such markets but could become active.

standard requirements: the scope of a notification should be predictable ex ante and should not have to be negotiated for each transaction. The Section would encourage consideration of graduated standard requirements for unproblematic cases, along the lines of the EU simplified and super-simplified treatment described above.

In this connection, the Section notes that the European Commission's 2023 Notice on the simplified procedure expressly provides for "super-simplified" treatment of transactions without any horizontal or vertical overlap, under which only limited sections of the Short Form CO must be completed, pre-notification contacts are not expected, and decisions are taken well within the standard 25-working-day period. A similar graduated approach in Swiss practice would materially improve the efficiency of the regime for both the parties and ComCo, and would be consistent with the ICN Recommended Practices to which Switzerland subscribes.

5. Transactions notified to the European Commission (Article 12 Draft MCO)

In its 2022 submission, the Section welcomed the rationale of the exemption from the Swiss notification obligation for transactions notified to the European Commission, while expressing concerns about legal certainty and timing, and suggesting an early, binding deadline for any decision by ComCo to deny the exemption. Article 12 para. 3 of the Draft MCO now provides that the Secretariat informs the undertakings "as a rule" ("in der Regel") within ten days of receipt of the copy of the EU notification if it considers that a Swiss notification obligation exists.

Given the considerable time pressure in M&A transactions, and the substantial effort of preparing a full Swiss notification at short notice, the Section respectfully submits that this ten-day period should be made binding, rather than indicative. A binding deadline is essential for the exemption to function in practice; otherwise, parties will notify in Switzerland on a cautionary basis, and the resource savings intended by the legislator will not materialise, for either the parties or ComCo.

The Section further notes that, under Article 9 para. 1bis of the revised Cartel Act, the exemption is available only where "all relevant product markets affected by the transaction are geographically defined in such a way that they encompass Switzerland and at least the European Economic Area". This geographic-scope condition will necessarily involve a measure of judgment at the time of filing. The Draft MCO should clarify the standard by which the Secretariat will assess whether this condition is met, and should confirm that the parties' good-faith characterisation of market scope – supported, where appropriate, by established EU or Swiss decisional practice on geographic market definition – will be respected absent manifest error.

6. Time limits (Article 22 Draft MCO)

As regards Article 22 of the Draft MCO, the Section welcomes the requirement of the notifying parties' consent to any extension of the review periods. Consistent with its 2022 submission, however, the Section suggests clarifying that such extensions are to remain exceptional and limited to specific situations where there is an objective reason to coordinate procedures, such as multi-jurisdictional remedies, or where the extension is requested by the parties themselves. Alignment with the timelines of foreign authorities should not, in itself, become a routine ground for prolonging Swiss proceedings.

As the Section noted in its June 2026 submission to the European Commission, the increasing use of stop-the-clock mechanisms and timeline extensions across jurisdictions can materially impair deal certainty, increase transaction costs and chill pro-competitive M&A activity. Accordingly, the Section respectfully suggests that the Draft MCO should include a provision requiring the Secretariat to state the specific compelling reason for any proposed extension, and should clarify that extensions may not be proposed for the sole purpose of aligning with foreign timelines where no coordination of remedies is contemplated.

7. Public takeover bids

Finally, the Section suggests using the revision to introduce a provision equivalent to Article 7(2) EUMR, under which the implementation of a public bid or of a series of transactions in securities is not caught by the standstill obligation, provided that the concentration is notified without delay and the acquirer does not exercise the voting rights attached to the securities in question. The absence of such a rule in Swiss law creates legal uncertainty for public transactions and forces parties to seek individual authorisations for early implementation. Article 19 para. 2 of the Draft MCO already contemplates restrictions on the exercise of voting rights in the context of public bids; a general derogation modelled on Article 7(2) EUMR would be a natural and welcome complement.

The Section notes that derogations from the standstill obligation for public bids – subject to immediate notification and non-exercise of voting rights – are a well-established feature of major merger control regimes, including under Article 7(2) EUMR, the UK Enterprise Act 2002 and the German Act against Restraints of Competition. Their absence in Swiss law places Swiss-listed targets at a comparative disadvantage and creates an asymmetry with the treatment of identical transactions notified to the European Commission. The Section therefore recommends that the Draft MCO should address this gap as a matter of priority.
