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Ordinance on the Control of Concentrations of Undertakings (Merger Control Ordinance, MCO)

of 17 June 1996 (Status as of 1 January 2013)

The Swiss Federal Council

based on Article 60 of the Cartel Act of 6 October 1995¹ (Cartel Act),
ordains:

Art. 1 Acquisition of control

An undertaking acquires control over a previously independent undertaking within the meaning of Article 4 paragraph 3 letter b Cartel Act if it is able to exercise a decisive influence over the activities of the other undertaking by the acquisition of rights over shares or by any other means. The means of obtaining control may in particular involve the acquisition of the following, either individually or in combination:

- a. ownership rights or rights to use all or parts of the assets of an undertaking;
- b. rights or agreements which confer a decisive influence on the composition, deliberations, or decisions of the organs of an undertaking.

Art. 2 Joint ventures

¹ A situation whereby two or more undertakings acquire joint control over an undertaking which they previously did not jointly control shall be deemed a concentration of undertakings within the meaning of Article 4 paragraph 3 letter b Cartel Act if the joint venture performs all the functions of an autonomous economic entity on a lasting basis.

² If two or more undertakings found an undertaking that they intend to control jointly, this constitutes a concentration of undertakings if the joint venture performs the functions set out in paragraph 1 and if business activities from at least one of the controlling undertakings are transferred to the joint venture.

Art. 3 Undertakings concerned

¹ The relevant thresholds according to Article 9 paragraphs 1-3 Cartel Act shall be calculated with reference to the turnover of the undertakings concerned in the concentration. In terms of this Ordinance, the undertakings concerned are:

- a. in a merger: the merging undertakings;
- b. in an acquisition of control: the controlling and controlled undertakings.

² If only part of an undertaking is the subject of the concentration, it is that part that constitutes the undertaking concerned.

Art. 4 Calculation of turnover

¹ For the calculation of turnover, all reductions such as discounts, rebates, value added tax and other consumption taxes as well as other taxes directly related to turnover shall be deducted from the amounts derived by the undertakings concerned from the sale of products and the provision of services within the ordinary business activities of the undertakings concerned in the preceding financial year.

² Financial years that do not cover a full twelve month period shall be converted to a full twelve month period based on the average turnover of the recorded months. Turnover in foreign currencies shall be converted into Swiss francs in accordance with generally accepted accounting principles applicable in Switzerland.

³ If, within a period of two years, two or more transactions take place between the same undertakings resulting in the acquisition of control over parts of these undertakings, those transactions shall be treated as a single concentration for the purposes of calculating the turnover. The decisive date is the date of the last transaction.

Art. 5 Turnover of an undertaking concerned

¹ The turnover of an undertaking concerned shall consist of the turnover from its own business activities and the turnover of:

- a. the undertakings in which it owns more than one half of the capital or holds more than one half of the voting rights or in which it is entitled to appoint more than half of the members of the bodies legally representing the undertaking or in which it otherwise has the right to manage the undertaking's affairs (subsidiaries);
- b. the undertakings which alone or jointly have the rights or powers listed under letter a (parent companies);
- c. the undertakings in which an undertaking under letter b has the rights or powers listed under letter a (sister companies);
- d. the undertakings over which two or more undertakings listed in this paragraph jointly have the rights or powers listed under letter a (joint venture companies).

² In calculating the total turnover of an undertaking concerned, the turnover from business activities between the undertakings mentioned in paragraph 1 shall not be taken into account.

³ The turnover of a joint venture that is jointly controlled by the undertakings concerned shall be apportioned among those undertakings in equal parts. Paragraph 2 applies by analogy.

Art. 6 Calculation of gross premium income of insurance companies

¹ Gross annual premium income shall include all premiums received and receivable from any direct insurance or reinsurance business in the previous business year, including all amounts for which reinsurance cover is being sought and after the deduction of any taxes or other duties levied on direct insurance premiums. In calculating the amount to be apportioned to Switzerland, the gross premium income paid by persons resident in Switzerland shall be taken into account.

² Article 4 paragraphs 2 and 3 and Article 5 apply by analogy.

Art. 7²

Art. 8³ Calculation of thresholds where banks or other financial intermediaries are concerned

¹ Gross income shall include all income earned from ordinary business activities in the previous business year in accordance with the provisions of the Federal Act of 8 November 1934⁴ on Banks and Savings Banks and its implementing orders, including:

- a. interest and discount revenue;
- b. interest and dividend income from securities;
- c. interest and dividend income from financial assets;
- d. commission income from credit transactions;
- e. commission income from security and asset transactions;
- f. commission income from other services;
- g. profits resulting from trading transactions;
- h. profits resulting from disposal of financial assets;
- i. income from shareholdings;
- j. income from real estate; and
- k. other ordinary income.

² Repealed by No I of the O of 12 March 2004, with effect from 1 April 2004 (AS 2004 1395).

³ Amended by No I of the O of 12 March 2004, in force since 1 April 2004 (AS 2004 1395).

⁴ SR 952.0

² Value added tax and other taxes directly related to gross income may be deducted therefrom.

³ Banks and other financial intermediaries that apply international accounting rules shall calculate gross income in line with the above provisions.

⁴ If only some of the undertakings concerned in a concentration are banks or financial intermediaries or if they are only partially active in those business areas the gross income of these undertakings or parts of undertakings shall be calculated and added to the turnover or gross premium income of the other undertakings or parts of undertakings concerned in order to ascertain whether the thresholds are met.

⁵ Article 4 paragraphs 2 and 3 and Article 5 apply by analogy.

Art. 9 Notification of a planned concentration

¹ Five copies of the notification of a planned concentration shall be filed with the Secretariat of the Competition Commission (Secretariat) as follows:

- a. in the case of a merger, jointly by the undertakings concerned;
- b. in the case of an acquisition of control, by the undertaking or undertakings acquiring control.

² In the case of joint notification, the notifying undertakings shall designate at least one joint representative.

³ Notifying undertakings or their representatives domiciled or residing abroad shall designate an address in Switzerland for service of documents.

Art. 10 Notification of the Swiss Financial Market Supervisory Authority⁵

The Competition Commission shall immediately notify the Swiss Financial Market Supervisory Authority of any notifications of planned concentrations involving banks within the meaning of the Federal Act of 8 November 1934⁶ on Banks and Savings Banks.

Art. 11 Content of the notification

¹ The notification shall contain the following information:

- a. name, domicile and a brief description of the business activities of the undertakings that are to be taken into account to ascertain whether the thresholds are met in accordance with Articles 4–8, and of the seller of the shares;
- b. a description of the planned concentration, of the relevant facts and circumstances, and of the goals that are being pursued by the planned concentration;

⁵ The name of this administrative unit was amended by Art. 16 para. 3 of the Publications Ordinance of 17 Nov. 2004 (SR 170.512.1). This amendment has been made throughout the text.

⁶ SR 952.0

- c. the turnover, balance sheet totals or gross premium income of the undertakings concerned calculated in accordance with Articles 4–8, and the amounts apportioned to Switzerland;
- d. information on all product and geographic markets that are affected by the concentration and in which two or more of the undertakings concerned jointly hold a market share of 20 per cent or more in Switzerland or in which one of the undertakings concerned holds a market share of 30 per cent or more in Switzerland, and a description of these markets containing at least information on the distribution and demand structures and on the importance of research and development;
- e. with regard to the markets referred to under letter d, the market shares of the undertakings concerned for the preceding three years and, if known, for each of the three principal competitors as well as an explanation of the basis used for calculating the market shares;
- f. for the markets referred to under letter d, information regarding undertakings that have newly entered the market in the preceding five years and undertakings that might enter these markets within the next three years and, if possible, the costs that would arise from an entry into the market.

² The notification shall be accompanied by the following documents:

- a. copies of the most recent annual accounts and annual reports of the undertakings concerned;
- b. copies of the agreements that effect the concentration or that are otherwise connected with it, insofar as their relevant content is not already contained in the information disclosed under paragraph 1 letter b;
- c. in the case of a public offer, copies of the offer documentation;
- d. copies of the reports, analyses and business plans made with regard to the concentration insofar as they contain information relevant to the assessment of the concentration that is not already contained in description provided in accordance with paragraph 1 letter b.

³ The product and geographic markets as per paragraph 1 letters d-f shall be determined as follows:

- a. The product market comprises all those goods or services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other hand with regard to their characteristics with regard to their characteristics and intended use.
- b. The geographic market comprises the area in which on the one hand consumers purchase and on the other hand suppliers sell the goods or services that constitute the product market.

⁴ Notifications shall be made in one of the official languages. Proceedings will be conducted in that language unless otherwise agreed. Accompanying documents may also be filed in English.

Art. 12 Simplified notification

Prior to the notification of a concentration, the undertakings concerned and the Secretariat may mutually agree on the details of the content of the notification. In doing so, the Secretariat may grant an exemption from the duty to submit particular information or documents set out in Article 11 paragraphs 1 and 2 if it is of the opinion that such information is not required for the assessment of the case. The duty to disclose additional information and documents in accordance with Article 15 is reserved.

Art. 13 Notification forms and explanatory notes

¹ The Competition Commission may detail the information required under Article 11 in notification forms and set out the notification requirements in more detail in explanatory notes. It may determine the extent to which a notification filed with a foreign authority may be used for the notification of planned concentrations in Switzerland.

² The Competition Commission shall publish any notification forms and explanatory notes in the Federal Gazette.

Art. 14 Confirmation of completeness of notification

The Secretariat shall within ten days provide the notifying parties with written confirmation that it has received the notification and that it is complete. In cases where the information or documents are incomplete on any material point, the Secretariat shall within the same period request the notifying undertakings to supplement the notification.

Art. 15 Additional information and documents

¹ Even after confirmation of the completeness of the notification, the undertakings concerned, any associated undertakings within the meaning of Article 5, and the sellers of the shares shall disclose to the Secretariat, within the deadline set by the Secretariat, such additional information and documents as may be relevant for the examination of the planned concentration. In particular, they shall disclose information on past or projected sales or turnover figures, the market development and their position in relation to international competition.

² The Secretariat may request affected third parties to provide information that may be relevant for the assessment of the planned concentration. To that end the Secretariat may inform third parties of the planned concentration in an appropriate manner while protecting the business secrets of the undertakings concerned, associated undertakings within the meaning of Article 5 and the sellers.

Art. 16 Permission for implementation

¹ The undertakings concerned may implement the concentration prior to the expiry of the period of one month in accordance with Article 32 paragraph 2 Cartel Act provided the Competition Commission notifies them that it regards the concentration as unobjectionable.

² If the Competition Commission permits implementation in accordance with Articles 32 paragraph 2 and 33 paragraph 2 Cartel Act, it may make implementation subject to certain conditions and obligations. In cases where permission to implement is granted in connection with a public offer, it may order that the voting rights acquired by the offeror be used solely for the preservation of the value of its investment.

Art. 17 Permission for implementation in the case of banks

If the Swiss Financial Market Supervisory Authority deems a concentration of banks necessary for reasons related to creditor protection, it may, at the request of the banks involved or ex officio, allow implementation at any stage of the proceedings and, if necessary, prior to the receipt of the notification of the planned concentration in accordance with Articles 32 paragraph 2 and 33 paragraph 2 in conjunction with Article 10 paragraph 3 Cartel Act. Prior to its decision, it shall invite the Competition Commission to comment.

Art. 18 Publication of the opening of an investigation

If the Competition Commission decides to open an investigation in accordance with Article 32 Cartel Act, this decision shall be published in the earliest possible edition of the Federal Gazette and the Swiss Official Trade Journal. The publication shall contain the name, domicile and business activities of the undertakings concerned and a brief description of the concentration as well as the period during which third parties may comment on the planned concentration that was notified.

Art. 19 Third party comments

Comments of third parties in accordance with Article 33 paragraph 1 Cartel Act shall be made in writing. In individual cases, the Secretariat may order a hearing.

Art. 20 Time periods

¹ The period of one month for the opening of an investigation in accordance with Article 32 paragraph 1 Cartel Act shall commence on the day following receipt of the complete notification and shall expire at the end of the day in the following month which has the same number as the day on which the period commenced; should this day not exist in the following month the period shall expire on the last day of the following month. Article 22a of the Federal Act of 20 December 1968⁷ on Administrative Procedure does not apply.

² The undertakings concerned shall be notified of the decision to open an investigation within the period of one month set out in Article 32 paragraph 1 Cartel Act.

³ The period for carrying out an investigation in accordance with Article 33 paragraph 3 Cartel Act shall commence on the day after service of the decision by the Competition Commission to open an investigation in accordance with Article 10 Cartel Act. Paragraph 1 applies by analogy to the calculation of any time periods.

⁷ SR 172.021

Art. 21 Material change in circumstances

Any material changes in the actual circumstances described in the notification must be given immediately and voluntarily to the Secretariat. If these changes have a considerable effect on the assessment of a planned concentration, the Secretariat may decide prior to the opening of an investigation, or the Competition Commission may decide, after opening an investigation, that the period under Article 20 shall commence only on the day after the Secretariat receives the information on the material changes.

Art. 22 Report on unobjectionable concentrations

The Competition Commission shall routinely report to the Federal Department of Economic Affairs, Education and Research⁸ on the concentrations that it has deemed unobjectionable. It shall identify the undertakings concerned and provide a brief explanation of why no investigation was opened in respect of any concentration subject to notification (Art. 32 para. 1 Cartel Act), why the concentration was not prohibited, or why no conditions or obligations were ordered.

Art. 23 Publication of decision after termination of an investigation

On completion of the investigation, the Secretariat shall arrange for the publication of the decision of the Competition Commission in the Federal Gazette and the Swiss Official Trade Journal. The publication shall contain the name and domicile of the undertakings concerned, a brief description of the planned concentration, a summary account of the grounds for the decision and the decision itself.

Art. 24 Transitional provisions

¹ Concentrations of undertakings within the meaning of the Cartel Act are exempt from notification for a period of four months after the Act comes into force provided:

- a. the agreement forming the basis for the concentration was entered into prior to the Act coming into force;
- b. a public offer was published prior to the Act coming into force.

² If implementation in Switzerland is prevented by an interim prohibition on implementation resulting from a public law authorisation procedure, including foreign merger control procedures, the period of four months shall be suspended until the interim prohibition on the implementation is lifted.

Art. 25 Commencement

This Ordinance comes into force on 1 July 1996.

⁸ The name of this administrative unit was amended in application of Art. 16 para. 3 of the Publications Ordinance of 17 Nov. 2004 (SR 170.512.1) on 1 Jan. 2013.