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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)

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*The Swiss Federal Council*

based on Article 60 of the Cartel Act of 6 October 1995<sup>1</sup> (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

<sup>1</sup> 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.

<sup>2</sup> 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.

AS 1996 1658

<sup>1</sup> SR 251

**Art. 3** Undertakings concerned

<sup>1</sup> 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.

<sup>2</sup> 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

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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

<sup>1</sup> 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).

<sup>2</sup> 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.

<sup>3</sup> 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

<sup>1</sup> 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.

<sup>2</sup> Article 4 paragraphs 2 and 3 and Article 5 apply by analogy.

**Art. 7<sup>2</sup>**

**Art. 8<sup>3</sup>** Calculation of thresholds where banks or other financial intermediaries are concerned

<sup>1</sup> 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 1934<sup>4</sup> 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.

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 Repealed by No I of the O of 12 March 2004, with effect from 1 April 2004 (AS 2004 1395).

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

<sup>4</sup> SR 952.0

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

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

<sup>4</sup> 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.

<sup>5</sup> Article 4 paragraphs 2 and 3 and Article 5 apply by analogy.

#### **Art. 9** Notification of a planned concentration

<sup>1</sup> 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.

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

<sup>3</sup> 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 Authority<sup>5</sup>

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 1934<sup>6</sup> on Banks and Savings Banks.

#### **Art. 11** Content of the notification

<sup>1</sup> 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;

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.