

Update

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Secretariat of Swiss Competition Commission advises on changes in shareholder structure of joint ventures

Joint control under Swiss competition law may be given even without technical veto rights of the minority shareholder if the majority shareholder is unlikely to exercise its casting vote in the event of a deadlock situation. This is the case, for example, if the majority shareholder is discouraged to do so by a lengthy settlement or escalation process or by a put option vested with the minority shareholder causing financial disadvantages to the majority shareholder.

Introduction

The Secretariat of the Swiss Competition Commission (Secretariat or ComCo) recently issued advice in accordance with Article 23 Paragraph 2 of the Federal Act on Cartels and other Restraints of Competition (the Cartel Act) to two companies, Party A and Party B (collectively, the Parties), which are both shareholders in a jointly controlled joint venture.

According to Article 23 Paragraph 2 of the Cartel Act the Secretariat advises undertakings on matters relating to the Cartel Act. As the Parties had planned to change the joint venture's structure, they requested the Secretariat to confirm that the transaction would not constitute a change of control within the meaning of Article 4 Paragraph 3 (b) of the Cartel Act and therefore not have to be notified to the ComCo.

Facts

Party A and Party B each hold 50% of the shares of a joint venture and proposed to change the shareholder structure: Party A would become the minority shareholder and Party B would become the majority shareholder.

The composition of the joint venture's board of directors (the Board), consisting of five members, should reflect the shareholder structure. The Board would take its resolutions with simple majority. Only certain important matters (in particular overall strategy, annual budget, business plan, financial planning and certain investments) would require the consent of representatives of both Parties.

In case the Board failed to resolve important matters, a clearly defined decision-making process and an escalation procedure would be established.

At the end of this escalation process, if no resolution on the overall strategy could be reached (and thus indirectly on the business plan, annual budget and financial planning, which must be in line with the overall strategy), an official sale process would be initiated in which Party B would have to acquire all of Party A's shares in the joint venture based on a current valuation. However, this would entail significant financial disadvantages for Party B.

Legal assessment of the authority

The Secretariat confirmed that joint control is given when two or more undertakings can exercise decisive influence over the activities of a joint venture. Joint control therefore exists when controlling companies reach strategic business policy decisions (eg, decisions concerning the budget, business plan, major investments and composition of management), which does not necessarily require unanimity for all of these rights at the same time.

In general, the ComCo's practice refers to the corresponding practice of the European Commission according to which joint control can lead to deadlock situations because each shareholder has the possibility to block strategic decisions. Such shareholders must therefore agree on the business policy of the joint venture and cooperate.

The Secretariat asserted that joint control is given when the parent companies must agree on all important matters relating to the joint venture. Where several parent companies have unequal stakes in a company, minority shareholders must have a right to veto decisions that are essential to the strategic commercial behaviour of the joint venture. Further, the veto right must trump the general one that minority shareholders have in order to protect their financial investments.

Even without a technical veto right, joint control can be presumed if the majority of the voting rights of one parent company is limited in importance and effect through other mechanisms – for example:

- › if the vote can be exercised only after a series of arbitration and settlement attempts or only to a limited extent;
- › if the use of the vote is linked to a put option, which would result in a significant financial disadvantage for the majority shareholder; or
- › if the interdependence of the parent companies makes it unlikely that a casting vote will be used.

In the case at hand, Party B (majority shareholder) would be able – after a multi-stage procedure to reach a mutual resolution – to unilaterally decide on certain important board matters. The Secretariat left the question open as to whether an escalation procedure alone was sufficient to establish joint control. It assumed that joint control would be given at least due to the put option of Party A (minority shareholder), which was linked to decisions on the broadly defined overall strategy containing all determining factors for the strategic development and business behaviour of the joint venture.

The sale of Party A's stake in the joint venture to Party B would be initiated if the Parties could not reach a mutual resolution in certain matters concerning the overall strategy after completing an escalation procedure. As the annual budget, business plan and financial planning must be in line with the overall strategy, a decision on the joint venture's overall strategy would be decisive for its strategic commercial behaviour.

Hence, the change in the shareholder structure of the joint venture does not constitute a change of control of Party A and Party B by vesting sole control to Party B. The Parties are not obliged to notify the transaction to the ComCo.

The advice issued by the Secretariat is not legally binding. However, the Secretariat would be expected to maintain this legal position in an actual proceeding.

Please do not hesitate to contact us in case of any questions.

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