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Switzerland

CARTELS

Contributor

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This country-specific Q&A provides an overview of cartels laws and regulations applicable in Switzerland.

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1. What is the relevant legislative framework?

The Swiss Federal Act on Cartels and other Restraints of Competition (Cartel Act; CartA) is based on three pillars: It contains provisions affecting unlawful agreements (Art. 5 CartA)M., unlawful practices by dominant undertakings and undertakings with relative market power (Art. 7 CartA), and concentrations of undertakings that threaten competition in the market (Art. 9 and 10 CartA).

The Cartel Act mainly focuses on administrative procedures before the relevant authorities: the Competition Commission (COMCO) and the Secretariat of COMCO (Secretariat). The Act contains provisions namely on the organization and duties of the competition authorities, the rights and obligations of the parties in a proceeding, as well as other procedural provisions, especially on administrative and criminal sanctions.

Furthermore, there are two major federal ordinances complementing the Cartel Act: the Ordinance on the Control of Concentrations of Undertakings (Merger Control Ordinance, MCO) and the Ordinance on Sanctions imposed for Unlawful Restraints of Competition (Cartel Act Sanctions Ordinance; CASO).While the Merger Control Ordinance sets out provisions on definitions (e.g. acquisition of control, joint control), calculation of thresholds and the notification of a planned merger before the Competition Authorities, the Cartel Act Sanctions Ordinance regulates the assessment criteria for the imposition of sanctions, the conditions and the procedure for obtaining complete or partial immunity from sanctions and the conditions and the procedure for notifications under Article 49a CA.

Not legally binding for courts but nonetheless of great practical importance for undertakings are the Notices and Explanatory notes of COMCO, especially the Notice on Verticals in general and the Notice on Verticals in the Motor Vehicle Sector. Besides, COMCO also has established Notices on Small and Medium Sized Undertakings, on the Use of Calculation Tools and on Homologation and Sponsoring related to Sports Articles. Moreover, both authorities, COMCO and the Secretariat publish Factsheets on their practices regarding specific substantive and procedural aspects in antitrust proceedings.

The Swiss legislator and the Federal Council also introduced specific provisions on the collaboration between other federal or cantonal authorities and COMCO in other legal framework (e.g. Act on Price Surveillance, Act on Public Procurement, Act on Technical Barriers to Trade, Telecommunications Act, Ordinance to the Federal Act on the Swiss National Bank, etc.). In the vast majority of these cases, this involves the assessment of market conditions, for which the federal or cantonal authorities must consult COMCO.

2. To establish an infringement, does there need to have been an effect on the market?

According to the Federal Supreme Court a *potential impact* in Switzerland from a certain conduct is sufficient for the scope of application. This also applies with regard to cartel agreements and facts concerning an abuse of market power. The potential effect on the market is sufficient for the competition authorities to prove the potential effect of an antitrust violation on competition.

3. Does the law apply to conduct that occurs outside the jurisdiction?

According to Art. 2 para. 2 CartA applies to practices that have *an effect in Switzerland*, even if they originate in another country (principal of impact). The *potential impact* in Switzerland from a certain anticompetitive conduct is sufficient for the application of the Cartel Act, regardless of whether the parties have their registered offices in Switzerland or are represented via a subsidiary or a branch. As stated by the Federal Supreme Court in the case “Gaba” Art. 2 para. 2 CartA does not require a detailed market analysis in order to affirm an impact on the Swiss market.

4. Which authorities can investigate cartels?

In Switzerland the competent authorities to apply the Cartel Act are the Competition Commission and the Secretariat of the Competition Commission. The latter investigates the cases and opens investigations in consultation with a member of the presiding body of COMCO. The Secretariat records the results in a written proposal (statement of objections) to COMCO. COMCO then takes its decision based on this proposal and the statements of the companies affected by the investigation.

5. What are the key steps in a cartel investigation?

Stage 1: Investigation of the Secretariat (1-5 years)

1. Suspicion of a violation of the law a. Leniency Application b. Whistle Blower c. Report d. Other sources (e.g., media reports, information provided by federal, cantonal or communal authorities)
2. Opening of an investigation
3. Investigation of the facts a. Search of premises b. Interrogations c. Written request for information (30 days) d. Other means of investigation (f. ex. inspection)
4. Possibly state of play meeting or final interrogation a. Possibly amicable settlement b. No amicable settlement
5. Written proposal (statement of objections) of the Secretariat
6. Statement of the parties (1 month – several months)
7. Transmission of the case to the Competition Commission

Stage 2: Decision of Competition Commission (0-1 years)

1. Decision to hear or not take up the case
2. Possibly: Additional investigation
3. Oral hearing of the parties
4. Decision
5. Publication of Decision

Stage 3: Appeals (1-10 years)

1. Appeal with Federal Administrative Court (2-10 years)
2. Appeal with Federal Supreme Court (1-4 years)

6. What are the key investigative powers that are available to the relevant authorities?

The key investigative measures of the competition authorities in Switzerland are:

- Searches of premises and seizure of evidence (unannounced inspections)
- Compulsory interviews (witnesses and parties)
- Written requests for information (under threat of punishment for non-compliance)

Search of premises: A dawn raid by the Secretariat may only be carried out with an written search warrant issued by the President of COMCO. The Secretariat has the right to search all types of premises, both business and private, and all types of recordings, regardless of whether they are recorded on paper or another data carrier. The Secretariat also has the right to seize the original documents. With respect to electronic data, the right to search extends to all data that can be accessed from within the premises including cell phones, laptops, USB-sticks etc. The Secretariat adheres to the principle of proportionality throughout the search and takes into account legitimate concerns of the affected undertakingundertaking and attempts to minimize interference with the undertakingundertaking's business activities wherever possible.

The person responsible for the undertaking and the affected employees , have the right to object to the search of documents and other recordings. If an objection is made, the seized evidence affected by the objection are sealed and kept in safe custody, and the Appeals Chamber of the Federal Criminal Court decides on the admissibility of the search.

Compulsory interviews: The authorities may summon and examine witnesses and parties. The witnesses are in principle obliged to testify and also to testify truthfully. Parties are protected by the right to remain silent, i.e. the authorities can summon them and even have them compulsorily produced, but they cannot force them to testify.

In Switzerland, only the organs and de facto organs of a company are considered to be testifying parties. Only they are protected by the right to remain silent. Other employees can thus be questioned as witnesses, with the consequence that they are not only obliged to testify, but also to testify truthfully. **Written request for information:** In Switzerland, only the organs and de facto organs of a company are considered to be testifying parties. Only they are protected by the right to remain silent. Other employees can thus be questioned

as witnesses, with the consequence that they are not only obliged to testify, but also to testify truthfully.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

In Switzerland, client-attorney communication is protected by the legal privilege which is governed by the rules of conduct for lawyers admitted to the bar and practising in Switzerland. Furthermore, lawyers are subject to a professional duty of secrecy stated in the Federal Act on the Free Movement of Lawyers (Lawyers Act) as well as the Swiss Criminal Code and under procedural law. Accordingly, lawyers may not only refuse to testify as a witness in a case on which they are advising but also to produce privileged documents. This legal privilege is comprehensive and applies irrespective of the documents' location and of when they were created. There are two main conditions: (i) the lawyer must be listed in the lawyer's register and (ii) the client-attorney communication must be produced in the exercise of the traditional lawyers' activities (legal advice and legal representation). Communication between a lawyer and a company is not protected if, for example, the lawyer acts as a board member and prepares documents in this capacity.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

According to Articles 8 ff. of the Ordinance on Sanctions imposed for Unlawful Restraints of Competition, COMCO grants full immunity from a sanction to the first undertaking that reports its own participation in a restraint of competition and if it provides either information that enables the competition authority to open an investigation or provides evidence that enables the competition authority to establish an infringement of competition.

The authorities grant immunity to an undertaking only if it

- has not coerced any other undertaking into participating in the infringement of competition,
- has not played the instigating or leading role in the relevant infringement of competition.

In addition, the authorities demand constant cooperation from the companies. The companies are obliged to do the following:

- voluntarily submit to the competition authorities all available information and evidence relating to the infringement of competition that lies within its sphere of influence,
- continuously cooperate with the competition authorities throughout the procedure without restrictions and without delay,
- cease their participation in the infringement of competition upon submitting its voluntary report or upon being ordered to do so by the competition authorities.

The companies can submit the notification to the authorities in writing or give it orally on the record. They can do so at the premises of the competition authorities, but they do not have to. They must also submit all possible evidence (e-mails, letters, contracts, witnesses etc.).

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

Sanctions may be reduced by a maximum of 50% for the sanction calculated for all subsequent undertakings who file a voluntary report under the leniency program after the first undertaking has done so. The importance of the undertakings' contribution to the success of the proceedings will be decisive.

If a company not only discloses its participation in an unlawful restriction of competition in the present case, but also discloses another cartel to be dealt with in separate proceedings, the sanction reduction can be up to 80%.

10. Are markers available and, if so, in what circumstances?

Under Swiss law the marker is the declaration that an undertaking will submit a leniency application. The marker therefore precedes the leniency application. Since only the first undertaking to make use of the leniency program is eligible for full immunity, the authorities record the exact order in which the leniency applications were submitted. Each submission receives a timestamp which determines the rank of leniency application. If the marker is subsequently not supplemented by a written leniency application, it is disregarded. The rank it occupied becomes available again and will be filled by the undertaking that

registered the subsequent marker.

A marker can only be filed by a single undertaking alone (or its representative), but not by two or more undertakings jointly (or their representative).

The marker shall contain at least the following indications: the name and address of the undertaking submitting the leniency application, including a person of contact;

1. a statement that the reporting undertaking has coordinated its market conduct with other undertakings with the purpose and/or effect of restricting competition in any way;
2. a statement that it intends to make a formal leniency application;
3. basic information on the restriction of competition as it can be ascertained with reasonable effort at the time the marker is made:

- Nature and duration of the restriction,
- undertakings involved,
- products/services and territories concerned;
- and date and signature.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

The authorities demand constant cooperation from the companies. The companies are obliged to do the following:

- voluntarily submit to the competition authorities all available information and evidence relating to the infringement of competition that lies within its sphere of influence,
- continuously cooperate with the competition authorities throughout the procedure without restrictions and without delay,
- cease their participation in the infringement of competition upon submitting its leniency application or upon being ordered to do so by the competition authorities.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

Swiss cartel law does not provide for criminal liability of private individuals. Accordingly, the grant of immunity does not extend to immunity from criminal prosecution..

13. Is there an ‘amnesty plus’ programme?

Yes. If an undertaking voluntarily provides information on further competition infringements, the penalty can be reduced by up to 80%. According to the CASO the information or evidence provided must meet the condition of the cooperation either enabling the authority to establish an infringement or enabling the authority to open an investigation (see above, question 3.1). So far, COMCO has had less than a dozen occasions to award a ‘amnesty plus’, most recently 2019, where subject of the investigations were potentially illegal vertical agreements concerning spare parts for tractors.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

The authorities and the undertakings can mutually agree to settle a case. The undertaking has to agree to adapt its conduct that the Secretariat considers to be in violation of antitrust law. The relevant facts, their legal assessment, and the amount of a possible fine are not negotiable. The initiation of the agreement can originate from either a party to an investigation or from the Secretariat, however, there is no obligation to conclude one, regardless of who proposes the agreement. The conclusion of a settlement requires on the part of the undertaking, that it is willing to stop the conduct qualified as inadmissible by the Secretariat, that it contributes to the simplification of the proceeding and that it waives its right to refer the proceeding to court.

In the event that not all parties to the investigation conclude a settlement agreement, an independent Chamber for partial decision approves the settlement for the agreeing parties, whilst the non-consenting parties receive an ordinary decision.

When concluding an agreement, the Secretariat usually dispenses with a detailed investigation of the facts and writes a shorter statement of objections. This leads as a rule to shorter and more cost effective proceedings. In addition, a possible sanction may be reduced by up to 20%. The authorities consider the conclusion of a settlement as a form of cooperation (see above, question 3.1).

A settlement requires the approval of the Commission (no court approval needed). Due to its binding nature on the concerned undertaking, a breach of the agreement may result in criminal (fine) or administrative sanctions.

15. What are the key pros and cons for a party that is considering entering into settlement?

Settlement proceedings are, in practice, take less time and lead to shorter judgements. The reason is that the undertakings can partially or fully waive the right to access the file , to make a written statement and to be orally heard by COMCO. Additionally, there is no appeal procedure. Parties usually pay a sanction (reduced by 5 to 20 %. The amount of the reduction depends on the stage of proceeding the settlement agreement is reached. As a rule of thumb, the sanction is lower the earlier in the procedure the agreement is reached.

In Switzerland, the parties do not have to make admit the facts. It is sufficient if they do not object to the content. However, the authorities may reward a "confession" with an additional sanction reduction.

From a potential plaintiff's point of view, it is a disadvantage that the basis for a civil action is poorer due to the lower density of the reasons stated in a settlement decision. From the parties point of view it is a disadvantage that the amount of a possible sanction cannot be negotiated. The Secretariat can however, in the specific case, provide information on the range in which a sanction is likely to be. Another possible disadvantage is that by entering into a settlement, the undertaking at least implicitly acknowledges its implication in an unlawful conduct under the Cartel Act.

For the other parties who do not conclude an amicable settlement, such a settlement can have a negative effect, as the authorities see themselves confirmed in their view of the facts and the law. They may therefore take a more offensive approach to the proceedings.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

According to the Cartel Act Federal and Cantonal offices have a legal duty to cooperate in competition investigations with the competition authorities and to provide it with the necessary documents and information. The competition authorities may provide the Price Supervisor with any information required for the accomplishment of the latter's duties. However, investigations of the competition authorities take precedence over procedures under the Price Supervision Act. So that often there are no parallel procedures..

In principle, data may only be disclosed to foreign competition authorities on the basis of an international agreement or with the consent of the undertaking concerned. In any case, before transmitting the data to a foreign competition authority, the national competition authorities shall notify the undertaking concerned and invite it to present its points of view.

This principle is severely limited by the the agreement between Switzerland and the European Union concerning cooperation on the application of their competition laws (Cooperation Agreement). It enables COMCO and the Directorate-General for Competition of the European Commission to exchange information and to notify as well as coordinate enforcement activities. Even if the undertaking does not consent the authorities may exchange information and documents, provided that they investigate the same or a related conduct. If an undertaking does not explicitly consent to the exchange the information may only be used for the purpose defined in the request and for the enforcement of the receiving party's competition laws with regard to the same or related conduct. If an undertaking has explicitly agreed to the information exchange, the transmitted or discussed information may be used to enforce competition law by the receiving competition authority in general. However, no information transmitted or discussed shall be used to prove an infringement that would result in the criminal prosecution or punishment ofnatural persons.

Pursuant the Cooperation Agreement, COMCO and the EU Commission are required to notify each other of their enforcement activities, if they may affect important interests of the other party. Enforcement activities are to be understood as any application of competition law by way of investigation or proceeding. Furthermore, the the competition authorities can coordinate their enforcement activities, e.g. the timing of their search of premises. COMCO, however, will not conduct search of premises on behalf of the European competition authorities and vice versa.

As the Secretariat carries out independent investigations and legal assessments, leniency applicatiosn (see above, question 3) or settlement agreements (see above, question 4) in other jurisdictions have no legal effect in Switzerland. Unless the undertaking, that provided the information has expressly agreed in writing, any exchange of information under the leniency or settlement procedures are excluded by the Cooperation Agreement.

Further, the competition authorities are responsible for co-operation with the institutions of the European Union relating to investigation in proceedings under the Swiss/EC Air Transport Agreement.

COMCO also actively participates in various networks of competition authorities such as the International Competition Network (ICN) and the Competition Committee of the Organisation for Economic Co-operation and Development (OECD). These networks, due to the lack of a legal basis, do not allow formal cooperation but essentially focus on the exchange of experience and knowledge.

17. What are the potential civil and criminal sanctions if cartel activity is established?

The Cartel Act contains the basic provisions of civil cartel law. The Act lists a number of civil claims that the potential plaintiff can assert in the event of an impediment of competition. It covers unlawful antitrust agreements as well as the unlawful conduct in case of market dominance by undertakings. The possible claims include the removal or omission of the obstruction (e.g. in case of a supply ban), damages and satisfaction (according to civil law), as well as a claim for the surrender of unlawfully obtained profits.

The criminal and administrative sanctions are set out in the Articles 49a et sq. Cartel Act. An undertaking that is involved in an unlawful agreement or is market-dominant and behaves in an unlawful manner is charged with an amount of up to 10 percent of the turnover generated in Switzerland during last three business years (maximum amount of fine). The amount shall be determined according to the duration and severity of the unlawful conduct. The presumed profit that the undertaking has made as a result shall be taken into account appropriately.

For undertakings that complete a notifiable concentration without notification or disregard the provisional prohibition of completion, violate a condition imposed with the authorisation, complete a prohibited concentration or fail to implement a measure to restore effective competition will be charged an amount of up to one million Swiss francs.

In addition, anyone who intentionally violates an amicable settlement, a final order of the competition authorities or a decision of the appeal authorities will be punished with a fine of up to CHF 100,000.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

A sanction is assessed in accordance to the following steps:

1. Calculation of the basic amount: The basic amount is between 0 and 10 percent of the turnover that an undertaking in question has achieved on the relevant market in Switzerland during the last three business years, depending on the seriousness of the infringement. The calculation is based on the type and gravity of the infringement and the profit. The special legal circumstances must also be taken into account, for example, in the case of insurances, the gross premium income is used, and in the case of banks, the gross income is used.
2. Consideration of the duration of the offence: The duration is usually based on the following three constellations: The infringement lasts less than 1 year, between 1 and 5 years or longer than 5 years
3. Consideration of mitigating or aggravating circumstances: Once the basic amount has been set, it may be increased if aggravating circumstances exist. For example, repeated violations of antitrust law may lead to an increase or if an undertaking has a leading role. This is the case, for example, if an undertaking takes the initiative in the organisation or preparation and implementation of an antitrust agreement. Special circumstances may be considered, for example, that an undertaking has a passive role. It should be noted that a reduction of sanctions only takes effect if the passive undertaking continues to participate in the infringement by coercing other undertakings.
4. Coverage of the burden by maximum fine: The sanction must not exceed the maximum 10% limit.

The highest sanction imposed by COMCO to date was CHF 180 million. In a recent case in 2022, the COMCO has fined seven dealers of VW branded vehicles in the canton of Ticino. They formed an unlawful cartel in the sale of new vehicles to private individuals and the public sector. The cartel members were fined with a total of around CHF 44 million.

In 2022, COMCO also has fined one road construction company with more than 1.5 million Swiss francs and eleven shareholders with a total of more than 400,000 Swiss francs. For years, the road construction company favoured its shareholders over other undertakings, tied

its customers to itself and thus hindered competition. In addition, the majority of shareholders agreed to a non-competition clause until 2016.

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

A parent undertaking is presumed to be jointly and severally liable with an infringing subsidiary. The Cartel Act does, however, not contain any explicit regulation.. In Switzerland, a practice has developed that follows European antitrust law which is based on the principle of one economic entity. Whether an undertaking is one economic entity is determined by the economic reality most important the degree of independence and financial risk. A group is considered to be a single economic entity, provided the ability of the parent company to efficiently control its subsidiary and does in fact exercise this possibility, so that the subsidiary is not in a position to behave independently from the parent company.

20. Are private actions and/or class actions available for infringement of the cartel rules?

Although the Cartel Act contains a chapter on civil proceedings (Article 12 ff CartelA), it has not gained yet much practical importance in Switzerland.

One of the main reasons for the little practical importance of private antitrust actions is evidentiary difficulties, as the burden of proof before the civil courts lies with the claimant. Additionally, there are no discovery procedures and no class actions . Since the losing party has to bear both court and legal costs the risk associated with an action for damages is relatively high..

21. What type of damages can be recovered by claimants and how are they quantified?

In Switzerland, a plaintiff can in principle only sue for the damage actually incurred and proven and the loss of future profit. Swiss law does not provide for punitive damages. Even if the applicable foreign law provides for such, Swiss courts refuse to award punitive damages.

22. On what grounds can a decision of the relevant authority be appealed?

After receiving the final decision of COMCO the parties may appeal before the Federal Administrative Court. The Federal Administrative Court can fully review the facts and the law including the imposed measures and sanctions.. It may also take its own investigative measures. Depending on the court's decision, COMCO's decision will be confirmed, annulled, or amended. The losing party may appeal the decision of the Federal Administrative Court before the Federal Supreme Court which usually only reviews the law.

23. What is the process for filing an appeal?

Within 30 days of the final decision of COMCO a fully reasoned appeal must be filed with the Federal Administrative Court. The appeal has suspensive effect. As mentioned, (see above, question 8.2.) the Federal Administrative Court can either annul, amend, or confirm the Commission's decision. The decision of the Federal Administrative Court can be appealed within 30 day of the notification with the Federal Supreme Court. There is no suspensive effect by law for procedures in front of the Supreme Court, the appellant, however, can request for the suspensive effect.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

In September 2022 COMCO opened an investigation against a Swiss pharmaceutical undertaking t that allegedly tried to keep its competitors out of the market with patent lawsuits in order to protect its own product for treatment of skin diseases against competing products.The investigation is intended to determine whether the undertaking abused its dominant market power by using so-called blocking patents.

Another investigation in the pharmaceutical sector into the alleged abuse of relative market power was opened in August 2022. In this case, a pharmaceutical undertaking refused to supply its products to a Swiss distributor at more favourable conditions than it offered to other distributors outside of Switzerland. This refusal to supply may constitute a breach of the antitrust law, if COMCO deems that the undertaking has a relative market power vis à vis the distributor. An undertaking is deemed to have relative market power if other undertakings are in such a way dependent on its supply of or demand for goods or services that they have no

adequate and reasonable opportunities to switch to other undertakings

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?

See above answer.

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

The Department of Economic Affairs, Education and Research (EAER) is expected to submit a dispatch on the partial revision of the Cartel Act by the second quarter of 2023. The partial revision aims primarily at the modernisation of Swiss merger control. By changing from the current qualified market dominance test to the significant impediment to effective competition test (SIEC test), the standard of review under cartel law for mergers will be adapted to international practice.

In addition, the revision should lead to an improvement of civil antitrust law. The Federal Council proposes to extend the right to bring an action to all affected parties, to introduce a suspension of the statute of limitations, to add a claim for a declaration of the unlawfulness of a restraint of competition and to be able to take compensation payments into account in an administrative sanction.

Furthermore, the objection procedure allows companies to inform the competition authorities about planned conduct that could violate competition law. If the authorities do not intervene within five months, the company does not run the risk of sanctions. However, this procedure has hardly been used in recent years, which is why the Federal Council proposes to make it more “practicable” by reducing the time limit to two months and only reviving the risk of sanctions once a formal investigation has been initiated.

The Federal Council also proposes to introduce time limits for administrative proceedings before competition authorities and courts in order to speed up procedures and reduce costs.

Finally, the legislature will also have to decide on three parliamentary motions. One is aimed at improving the situation of SMEs in competition proceedings, another is intended to oblige the authorities to take into account both qualitative and quantitative criteria to assess the inadmissibility of a competition agreement, the final motion aims at strengthening the principle of investigation in competition proceedings.

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