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Switzerland
Competition Litigation

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

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Switzerland: Competition Litigation

1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

Damages claims can arise from various infringement of Swiss competition law. This includes cartel, bid rigging, anticompetitive vertical restrictions (Art. 5 of the Federal Act of 6 October 1995 on Cartels and other restraints of Competition (the "**Cartel Act**")), and abuse of dominance (Art. 7 Cartel Act).

2. What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?

Actions for damages are generally brought (i) on the basis of general tort law – Art. 41 et seq of the Swiss Code of Obligations ("**SCO**"), in combination with relevant competition law provisions laid down in Art. 12 et seq. Cartel Act, or (ii) on a contractual basis if one of the clauses violates competition law – Art. 97 et seq. SCO.

Contract-based actions differ from civil actions in that they provide for specific limitation periods (Art. 127 et seq. SCO), a reversal of the burden of proof on the debtor in respect of fault (Art. 97 par. 1 SCO), and specific provisions in respect of joint and several liability (Art. 143 et seq. SCO). See for example: Judgment of the Commercial Court of the Canton of Zurich of 7 December 2021 (HG180172-O).

The present analysis focuses on tort actions, which constitute the strong majority of damage cases.

Under general tort principles, it is necessary for the claimant to establish (i) a wrongdoing by the defendant, (ii) loss or damage incurred by the claimant and (iii) a causal link between the wrongdoing and the loss or damage.

In addition, as a general rule of civil procedure under the Swiss Civil Procedure Code (the "**CPC**"), a claimant must have standing in order to bring a claim – i.e. a direct, legitimate and personal interest in seeking the compensation claimed.

In the context of a competition damages claim, this means that currently, only those undertakings which have been affected directly by a competition law infringement can seek remedy and/or damages before the civil court (Art. 12 Cartel Act). So far, consumers are unable to rely on the Act to seek compensation.

Yet, the Cartel Act is in the process of being revised, notably in relation to private enforcement (the **"New Cartel Act**"). In particular, the New Cartel Act is expected to open legal standing to any "*person whose economic interests are threatened or affected by an unlawful restriction of competition*" including consumers and public authorities (e.g. public contracting authorities). Entry into force of the new text is yet to be scheduled. It is unlikely to occur before 2026 or 2027.

Finally, there is no statutory framework available for associations to bring collective actions on behalf of multiple claimants (see Q.11 below). This is not expected to change in the near future.

3. What remedies are available to claimants in competition damages claims?

On the basis of Art. 12 Cartel Act, claimants in competition damages claims may seek monetary compensation for the loss (material and non-material) suffered and, where appropriate, injunctive relief, as well as the surrender of unduly realised gains by the defendant (see e.g. FSC decision 139 II 316, also referenced under 4A_449/2012 of 23 May 2013).

Damages are awarded on the basis of the costs necessary to repair the loss, considering any reducing factors (such as the fault of one of the parties or the fact that the injured party did not mitigate its loss as much as it could have done) plus interest (see Q.4 and Q.18 below).

With respect to contractual claims, an anticompetitive clause will be declared null and void. So will be the contract as a whole in case of a non-severable clause (Art. 13 par. 1 Cartel Act). The court may also instruct that the contract be adjusted on competition law compliant terms in line with the market or the industry standard (Art. 13 par. 2 Cartel Act).

Finally, the New Cartel Act should introduce the option to seek a declaratory decision from the civil judge, establishing where applicable, the existence of a

competition law infringement (Art. 12 letter b New Cartel Act).

4. What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?

Under Swiss law, the quantum of the loss or damage suffered by the injured party is the maximum amount that a defendant may be liable to settle. Swiss law does not allow for punitive damages to be awarded.

In most cases, calculating damages requires the intervention of an expert.

Liability for competition law infringements, as for other liability causes recognised in the context of the Swiss tort system, is joint and several (Art. 50 par. 1 SCO).

A successful leniency application bears no consequence on the possible civil liability of the leniency applicant (see Q.16 below).

5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

Duration – The limitation period for bringing a competition damage claim under Swiss tort law is twofold (Art. 60 SCO): (i) three (3) years from the time the injured party becomes aware of the damaging infringement (relative limitation), and (ii) then (10) years from the date of infringement (absolute limitation). If either of these two-time limits are not complied with, the action will be time-barred.

In the context of a continuous infringement (generally the case in competition law infringement matters), the three year-relative limitation period initiates once the anti-competitive behavior has ended.

Interruption – The statute of limitations is interrupted when the defendant acknowledges the debt or when the claimant asserts his rights by legal action or debt collecting proceedings within the limitation period (Art. 135 SCO).

However so far, the statute of limitation is neither suspended nor extended by an investigation of the alleged infringement being conducted by the Swiss Competition Commission (the "**COMCO**").

Thus, unless the claimant can establish that he was not aware of the investigated infringement, competition damages claims under the current framework may become time-barred even before completion of the COMCO investigation(s).

This weakness in the private enforcement framework is due to change with the Cartel Act ongoing reform: Art. 12*a* of the New Cartel Act provides that "*the limitation period for claims arising from unlawful restrictions on competition is suspended from the time an investigation is initiated, and until the decision comes into force*". Under this provision, the statute of limitations will only begin to run – or resume running if it had already begun before the investigation was initiated – when the decision comes into force.

It is too early of course to discuss the start of the limitation period in the context of follow-on claims, and the point in time at which the claimant will be deemed to have had enough information to bring a claim (straight following issuance of a COMCO decision, upon publication of the decision in the official journal, or press release on COMCO's website, etc.).

For now, a claimant must keep in mind that the limitation period to introduce a damage claim in Switzerland may turn out to be surprisingly short.

6. Which local courts and/or tribunals deal with competition damages claims?

Competition damages claims are dealt with at cantonal level, by dedicated courts (Art. 5 al. 1 let. b CPC). As per Art. 14 Cartel Act, each canton designates a single court competent to hear cases in competition law related matters at cantonal level. In Geneva, the Civil Chamber of the Court of Justice has jurisdiction over competition damages cases. There is one level of appeal, straight before the Swiss Federal Supreme Court (the "**FSC**").

7. How does the court determine whether it has jurisdiction over a competition damages claim?

Domestic disputes

Swiss courts have jurisdiction over a competition damage claim in any of the following cases: (i) when the claim is brought against a defendant with residence / legal seat (place of business) in Switzerland; (ii) when the anticompetitive practice took place in Switzerland, or (iii) when the prejudice was suffered in Switzerland. Territorial competence within Switzerland is governed by

Art. 36 CPC.

International disputes

Disputes involving an EU/EFTA based defendants, are governed by the Lugano Convention ("**LC**") on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (30 October 2007). Accordingly, the action can be brought alternatively (i) at the place of residence/legal seat of the defendant (Art. 2 par. 1 LC), (ii) at the place where the infringement took place or where the damage materialised (in contract-based matters, at the place where the contractual obligation was/is to be performed (Art. 5 par. 1 letter a and par. 3 LC)), or (iii) in case of multiple defendants, the place of domicile of one of them (Art. 6 LC).

Where defendants are based outside the EU/EFTA, the Federal Act on Private International Law ("**PILA**") applies by default unless international conventions have been signed by Switzerland with specific countries.

8. How does the court determine what law will apply to the competition damages claim?

In case of cross-border anticompetitive practices, the question of applicable law is governed by Art. 137 PILA. However, this provision applies restrictively to competition damage claims (tort) introduced on the basis of Art. 12 Cartel Act. It does not cover contractual aspects, nor does it address actions brought in the context of administrative proceedings.

In essence, Art. 137 PILA provides that the applicable law should be the law in force within the market whereby the competition infringement has harmed the claimant.

9. What is the applicable standard of proof?

On standard of proof, strict evidence on the merits is required for civil claims. Interim measures can be sought, based on plausibility.

10. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

It is generally agreed that a competent civil court, if seized following COMCO's final decision on the same matter (object and parties), should consider itself bound by this decision and not dismiss it. Under such a scenario, the claimant only needs to establish causation and loss.

Furthermore, if prompted to assess a competition law infringement during civil proceedings, the Swiss judge is given the option to seek the (non-binding) opinion of the COMCO on the case at stake (Art.15 Cartel Act). In practice, the civil judge hardly ever solicits the COMCO and most of the time assesses the infringement on its own account. While the former is not bound by a COMCO's expert opinion, the civil court would have to lay down convincing arguments to depart from this opinion.

11. To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?

As civil and administrative authorities are independent from one another, public and private enforcement of competition law may take place on the same matter, in parallel. Respective proceedings may therefore be initiated simultaneously or consecutively.

However, the civil court may, of its own motion or at the request of a party, suspend the civil proceedings until the administrative proceedings are settled (Art.126 CPC), in other words until a final COMCO decision is issued.

12. What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation of claims through case management)? What, if any, threshold criteria have to be met?

Swiss law does not provide for a class action mechanism. However, the following options may enable claimants to regroup their actions together: (i) The voluntary joinder (Art. 71 CPC) allows claimants whose rights and duties result from similar circumstances or legal grounds to jointly appear in court. However, each claimant is a party and proceeds on its own initiative. (ii) The assignment of claim (Art. 164 SCO) enables claimants to assign their claim to a group or association that represents them collectively, making the procedure economically viable. The assignment of claims must be made in writing, before the case is introduced.

13. Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?

Under general principles of Swiss tort law, the burden is on the claimant to substantiate the loss (the infringement, the loss and the link between the two).

Neither the Cartel Act, nor the case law (which to date remains very restricted) provide for any mechanism to alleviate the burden of proof – which can prove to be particularly complex for the claimant.

Thus, where the passing-on defense is raised – according to which it is alleged by the defendant that the claimant passed on any overcharge from the infringement on the upstream market to its own customers on the downstream market – failure by the claimant to demonstrate that it genuinely incurred the loss and did not pass it through to customers results in the claimant being denied compensation. So far, there is no sign of any case law trying to interpret the passing-on defense restrictively allowing for the claimant to seek at least partial compensation.

It must be pointed out that under the New Cartel Act, consumers will also have standing in court. Obviously, in such context, any pass-on defense argument will be dismissed.

14. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

Experts can be appointed by the court on its own motion and/or at the request of the parties (Art. 183 al. 1 CPC). Judicial experts are typically expected to assist in the (often) complicated exercise of quantifying damages. They have the duty to act impartially and truthfully and deliver their findings in the form of an expert report (Art. 184 al. 1 CPC).

In view of the difficulties involved in calculating the damage, conducting an expertise will generally be required (see for example: FSC decision 139 II 316, also referenced under 4A_449/2012 of 23 May 2013, or Judgment of the Commercial Court of the Canton of Zurich of 7 December 2021 (HG180172-O)).

15. Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?

Cases before the relevant cantonal jurisdiction are heard and usually decided by a three-judge panel.

Evidence must be substantiated by each party to support their claim (Art. 8 of the Swiss Civil Code). As any legally relevant and disputed fact must be evidenced (Art. 150 al. 1 CPC), the burden of proof, in the context of competition damages claims, generally lies with the claimant. The court assesses the evidence as per its own discretion (Art. 157 CPC).

Proceedings are mainly written.

Evidentiary material includes testimony, physical records, inspection, expert opinion, written statements and questioning and statements by the parties (Art. 168 CPC). Hearings of parties, witnesses and experts are conducted by the civil judge, with the possibility for parties to submit questions during the hearing. Hearings are recorded in minutes.

16. How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?

Damage claims and competition ones in particular are lengthy and complicated cases. The time from submission of a claim until the final outcome varies greatly depending on the canton in which the case takes place, its complexity, the involvement of disclosure orders, appointment of experts, possible consultation of the COMCO, etc.

The duration of first instance proceedings varies depending on the canton in which the case takes place, and can easily take three to four years. There is one level of appeal, straight before the FSC. Proceedings before the FSC usually take one to two years. Following its judicial review, the FSC either issues a final judgment or refers the case back to the relevant cantonal court for a revised decision to be adopted.

17. Do leniency recipients receive any benefit in the damages litigation context?

Leniency recipients are not immune from follow-on damages claims. However, they may benefit from a certain level of protection due to the rules on disclosure and access to file, as the COMCO is entitled to protect some information held in the file (see Q.22 below).

18. How does the court approach the assessment of loss in competition damages cases? Are

"umbrella effects" recognised? Is any particular economic methodology favoured by the court?

Demonstrating / assessing the extent of harm/losses caused can prove difficult for the court. In this context, the court can seek help of expert evidence (see Q.13), consult with COMCO (though this option is rarely used in practice), seek disclosure of further evidence, etc.

Economic methodology remains undeveloped within Swiss case law, given the limited amount of competition damages claims recorded so far. When prompted on the evaluation of a quantum of damage, practitioners usually rely on EU case law. In general, either of the following two methods is used: (i) the comparative method, which relies on the price that the claimant would have paid on a similar but competitive market (absent the infringement), against the price charged during the period of the infringement; (ii) the cost-based method, which involves quoting a price in a hypothetical competitive market (estimate the unit price of a product and increase it by a fair profit margin, considering the costs borne by the company absent the competition law infringement). This second option is suitable when the company sells only one type of product, which allows for an easy reconstruction of the unit cost.

In the absence of Swiss case law illustration, experts and practitioners refer to the umbrella effect as a relevant argument to claim for additional damages by reference to European case law on the subject.

19. How is interest calculated in competition damages cases?

In the absence of a specific provision (in a contract, the law or custom), the (by default) legal/statutory interest rate amounts to five percent per annum: this corresponds to the compensatory interest, which runs from the time the damage occurs (Art. 73 par. 1 SCO).

Once a court decision has been issued, another default interest (of five percent) starts applying. These two forms of interest are not cumulative. Thus, the default interest replaces the compensatory interest once the former comes into play.

20. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

Under Swiss tort law in general, liability is joint and several for infringements of competition law involving various defendants (e.g. Cartel case).

The claimant may sue one infringer for the entire loss suffered. In turn, the defendant becomes subrogated in the claimant's rights and may take action against other infringers.

In any event, it will be for the court to decide how to apportion the burden of compensation among the various liable infringers (Art. 50 SCO *cum* Art. 148 al. 2 and 149 SCO).

21. In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?

The settlement option is available in competition damages claims. It can be attractive for defendants to avoid a public judgment and in turn additional damage claims.

When recorded with the competent court in civil proceedings, a settlement has the same effect as a binding court decision (Art. 241 CPC). Third parties may be involved in the settlement and contractually bound by it. Yet it will not have on them the effect of a binding court decision.

22. What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?

Collective settlements are available under the same conditions as bilateral settlements.

23. What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?

The CPC does not provide for a general pre-trial discovery process. However, during proceedings, parties or third parties can be ordered by the judge (sometimes at another party's request) to disclose evidentiary documents. In this context, parties and third parties have a duty to cooperate in the gathering of evidence (Art. 160 CPC). In particular, they have the duty to disclose documents when ordered to do so by the court. However,

in each case, the claimant should seek to identify the category of evidence as precisely as possible and demonstrate to what extent disclosure is necessary, proportionate, and linked to the matter at stake. This provision is not meant to allow for "fishing expedition".

In this context, a party may attempt at seeking disclosure of the COMCO's investigation file or at least part of it. If considered relevant, the court may relay this disclosure request to the COMCO. In turn, the COMCO assesses the interests at stake. It may decide to let the protection of confidentiality prevail. Thus, the COMCO is entitled to deny access to the file, provided the requested documentation is not directly linked to an unlawful agreement ("illicit facts") (Art. 27 of the Federal Act on Administrative Procedure *cum* Art. 39 Cartel Act). In more common cases and in accordance with the principle of proportionality, the COMCO may take certain measures such as ordering disclosure of a redacted version of the requested documentation (name of business partners, replacing certain figures with a general order of magnitude).

Statements and evidence issued in the context of a leniency application are generally protected by the COMCO based on a public interest consideration to preserve the effectiveness and efficiency of the program.

24. What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process?

When prompted by the parties, the judge is to take appropriate measures to ensure that the collecting of evidence does not infringe any legitimate interest such as the protection of trade secrets (Art. 156 CPC).

25. Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?

Court fees are decided by the court and allocated between the parties spontaneously (*ex-officio*), unlike legal fees (expenses engaged for professional representation and other necessary disbursements), which will only be (re)-allocated if a party successfully claims compensation for these fees.

Both court fees and legal fees are allocated between the parties based on the outcome of the case (Art. 105 and 106 CPC).

In principle, the unsuccessful party can be made liable for both court fees and legal fees (Art. 106 al. 1 CPC). However, if no party is entirely successful, costs are allocated in accordance with the outcome of the case (Art. 106 al. 2 CPC).

26. Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party's costs? Are lawyers permitted to act on a contingency or conditional fee basis?

While there is no specific legislative or regulatory framework governing third-party funding of competition damage claims in Switzerland, it is possible, subject to compliance with ethic and deontology considerations, to rely on third-party's funding to finance legal proceedings (FSC decision 131 I 223).

Third parties most likely to finance legal proceedings are specialised finance companies, investment funds and brokers. In practice, third-party funding of competition law claims remains limited.

Lawyers are prohibited from financing legal proceedings themselves or from charging fully contingent fees. However, they may charge success fees in addition to a non-contingent fee agreement – subject to (i) the non-contingent fee rate being reasonable, (ii) the non-contingent fee remaining higher than the outcome based fee, and (iii) express approval from the client (collected at the outset of the mandate or at the end of the dispute).

27. What, in your opinion, are the main obstacles to litigating competition damages claims?

Private enforcement in Switzerland to date remains largely immature as a result of various obstacles blocking the way to viable competition damages claims. The most saliant obstacles are as follows:

- **Quantifying damages** – absence of guideline on economic methodology, lack of case law / practical illustration on quantifying a loss due to a breach of the Cartel Act. This immaturity of the system leads to great uncertainty as to the outcome of an action, which often discourages claimants to hire costly expert resources.
- **Statute of limitations** to introduce a competition damages claim being too short and in complete disconnection with a pending COMCO investigation on the same matter, possibly leading to denial of justice

(when a private action is time barred before the outcome of a COMCO's investigation on the same competition law infringement).
- **Restriction of access to COMCO's file**, potentially placing the claimant in an unfair position towards the defendant.
- **Lack of a collective redress mechanism** dedicated to competition damage claims.
- **A great uncertainty** as to the outcome of damages claims also constitutes a major obstacle: while it is generally acknowledged in practice that civil courts, in the context of a follow-on action, abide by a COMCO decision establishing an infringement (same object and parties), Swiss law does not make it a statutory obligation on the civil judge to alleviate the burden of proof on the claimant, nor does it establish a presumption of harm based on the relevant infringement decision.

As a consequence of this pending uncertainty, the number of competition damages claims brought before the competent civil courts remains low, which generates further uncertainty when evaluating chances of success prior to filing an action.

28. What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?

The New Cartel Act (reform of the Cartel Act currently in progress) due into force in the next years is expected to improve the status of private enforcement substantially – to the point where the COMCO, in its 2019 annual report, stressed that cartel members could be deterred from cooperating with the competition agencies under the leniency program, given the increased risk of subsequently having to pay damages.

The main changes relevant to this analysis embodied in the New Cartel Act are as follows:

- Extending the active legitimation to all parties whose economic interests are threatened or affected by an unlawful restriction of competition. In particular, consumers and public authorities should be able to file civil claims based on anticompetitive behaviors.
- Suspending the statute of limitations in civil procedures from the start of a COMCO investigation on the same infringement until its final decision.
- Introducing an option to seek a declaratory decision from the civil judge, where applicable, establishing the existence of a competition law infringement.
- Introducing an option for the COMCO to consider damages paid spontaneously in the context of a civil litigation, in the calculation of a fine.

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