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Cartels

Switzerland: Law & Practice
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Law and Practice

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1. Basic Legal Framework

1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

The legal basis for challenging cartel behaviour and its effects in Switzerland is the Federal Act on Cartels and other Restraints of Competition (Cartel Act). In particular, Chapter 4 of the Cartel Act (Article 18 and following) sets forth the legal framework of the administrative procedure. Details on sanctions (ie, fines) for cartel conduct are set forth in the Ordinance regarding the Sanctions for Unlawful Restrictions of Competition (Ordinance on Sanctions).

In addition, abusive prices may be challenged under the Price Monitoring Act, which applies to prices that are not the result of effective competition.

1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

Public enforcement of the Cartel Act is the responsibility of the Competition Commission (ComCo) and its Secretariat. The ComCo consists of 12 members and is the decision-taking body. The Secretariat conducts investigations, prepares the decisions of the ComCo and, together with one presidium member of the ComCo, issues the necessary procedural rulings. The total headcount of the Secretariat amounted to 74 employees at the end of 2019.

Prevention or termination of abusive prices under the Price Monitoring Act is the responsibility of the Price Regulator and its staff.

The Cartel Act is designed as an administrative act imposing administrative sanctions. However, it is mostly undisputed and has been confirmed by the Federal Supreme Court (judgment 139 (2012) I 72 – Publigroupe) that the sanctions (ie, fines) of the Cartel Act are criminal in nature in the meaning of the European Convention on Human Rights (ECHR). Therefore, an investigation addressing sanctionable cartel behaviour must in principle respect the procedural rights to a fair trial, as set forth in the ECHR.

In addition, there are a few (explicitly) criminal sanctions against individuals for cartel behaviour under the Cartel Act, in particular relating to the infringement of amicable settlements and administrative orders, as well as non-compliance with rulings of the competition authorities concerning the obligation to provide information.

Private third-party claims under the Cartel Act for elimination, desistance, damages and/or surrender of profits are civil in nature.

1.3 Private Challenges of Cartel Behaviour/Effects

Any person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request the following by way of private civil litigation:

- the elimination of or desistance from the hindrance;
- damages and satisfaction in accordance with the rules of the Swiss Code of Obligations (CO); and
- surrender of unlawfully earned profits in accordance with the provisions on agency without authority.

According to the prevailing doctrine, only companies, not consumers, are authorised to bring these claims under the Cartel Act. Consumers may, however, bring claims under general tort law.

1.4 Definition of "Cartel Conduct"

Cartel conduct is defined in the Swiss Cartel Act. It comprises the two categories of unlawful agreements affecting competition (Article 5, Cartel Act) and unlawful practices by dominant undertakings (Article 7, Cartel Act).

In regard to the first category, agreements that significantly restrict competition in a market for specific goods or services and are not justified on the grounds of economic efficiency, and all agreements that eliminate effective competition, are unlawful (Article 5(1) Cartel Act). Some types of agreement are presumed to lead to the elimination of effective competition: agreements between actual or potential competitors (horizontal agreements) on direct or indirect price-fixing, on the limitation of quantities of goods or services or on the allocation of markets geographically or according to trading partners (Article 5(3), Cartel Act). In addition, the elimination of effective competition is also presumed in the case of vertical agreements regarding fixed or minimum prices and the prohibition of passive sales in distribution contracts (Article 5(4), Cartel Act).

Even if the presumption of the elimination of effective competition can be rebutted in a specific case, these agreements principally qualify as significant restrictions of competition, as confirmed by the Federal Supreme Court (judgment 143 (2016) II 297 – Gaba). Therefore, such agreements are admissible only if they can be justified on economic efficiency grounds – a justification that so far has rarely succeeded in practice.

In regard to the second category, dominant undertakings behave unlawfully if, by abusing their position in the market, they hinder other undertakings in their efforts to start or continue to compete, or disadvantage trading partners (abuse of a dominant position, Article 7, Cartel Act). In particular, some specific conduct described in Article 7(2) of the Cartel Act is considered unlawful (eg, any refusal to deal, any discrimination

between trading partners in relation to prices or other conditions of trade, or any imposition of unfair prices or other unfair conditions of trade).

Joint action between competitors does not amount to a violation of law if it does not constitute behaviour under either of the two categories. By way of example, certain types of information exchange among competitors may not amount to infringements of competition law if the information is not of competitive relevance.

There are no sectors or industries that are exempt from public cartel enforcement actions per se. However, statutory provisions that do not allow for competition in a market for particular goods or services (eg, provisions that establish a state-controlled market or price system and provisions that grant special rights to specific undertakings (eg, a monopoly) to enable them to fulfil public duties) take precedence over the provisions of the Cartel Act (Article 3(1), Cartel Act). For certain industries, this may result in at least a partial exemption from the application of the Cartel Act (eg, in the public health sector).

1.5 Limitation Periods

For sanctions (ie, fines) for cartel conduct, a limitation period of five years applies; if the restraint of competition has not been exercised for more than five years by the time an investigation is opened, sanctions may no longer be imposed (Article 49a paragraph 2 litera b, Cartel Act). Once an investigation has been opened, the ComCo takes the view that a limitation period no longer applies – ie, that fines may be imposed regardless of the duration of the investigation proceedings (see a decision from December 2013 regarding the air cargo sector, which is currently under review by the Federal Administrative Court). According to a recent decision of the Federal Administrative Court (case B/831 2011, SIX DCC, 2019), the limitation period is ten years as of the infringement, but the period is interrupted with the opening of an investigation by the ComCo. The Federal Administrative's judgment is currently under review by the Federal Supreme Court.

1.6 Extent of Jurisdiction

The Cartel Act applies to practices that have an effect in Switzerland, even if they originate in another country (Article 2(2), Cartel Act). This provision is applied broadly. The Federal Supreme Court held that any behaviour that could have effects in Switzerland shall fall within the scope of application of the Cartel Act, without further qualification of these effects (judgment 143 (2016) II 297 – Gaba).

The ComCo considered, for example, that a provision in a foreign distribution agreement that limits sales to a specific territory constitutes a prohibition of passive sales to Switzerland, even where Switzerland is not specifically excluded, and has issued fines for such conduct of CHF156 million on the BMW group for impeding parallel imports into Switzerland. The Federal Supreme Court recently confirmed this decision (judgment 2C_63/2016 – BMW).

1.7 Principles of Comity

The principle of comity is not explicitly provided for in the Cartel Act. Where practices may have an effect in Switzerland, they are subject to the Cartel Act, and the ComCo will generally apply the provisions of the Cartel Act, regardless of enforcement in other jurisdictions.

Switzerland and the European Union signed an agreement relating to co-operation on the application of their competition laws that entered into force in 2014 (Co-operation Agreement). The Co-operation Agreement contains non-binding provisions on conflict avoidance (negative comity, Article 5), as well as on the opportunity to request the beginning or expansion of enforcement activities (positive comity, Article 6). While there is no published practice available yet that applies the Co-operation Agreement, the ComCo has to take these provisions into account where conduct may potentially be subject to enforcement by the European Commission.

2. Procedural Framework for Cartel Enforcement – Initial Steps

2.1 Initial Investigatory Steps

Public enforcement of competition law regularly starts with informal market observations by the Secretariat.

The market observations may lead to a preliminary investigation by the Secretariat. Preliminary investigations may be initiated by the Secretariat itself, by undertakings involved or by third parties. The Secretariat investigates if there are indications of an unlawful restraint of competition. If there is no prima facie evidence to this end, the Secretariat closes the preliminary investigation, regularly by way of a short report on the market and the undertakings concerned.

If there is prima facie evidence of an unlawful restraint of competition, the Secretariat, in consultation with a member of the presiding body of the ComCo, shall open a formal investigation. However, the ComCo may also directly open an investigation. The Secretariat is obliged to open an investigation whenever asked to do so by the ComCo or by the Federal Department of Economic Affairs, Education and Research.

In a formal investigation, the Secretariat of the ComCo collects evidence and proceeds to hearings. On this basis, the Secretariat

provides a draft decision, comparable to a Statement of Objections by the European Commission, to the ComCo. The ComCo then takes the decision, usually after having held a hearing of the parties.

2.2 Dawn Raids

The competition authorities are allowed to conduct surprise visits ("dawn raids") – that is, conduct searches without prior notice and seize documents (Article 42(2), Cartel Act). These dawn raids can be conducted at the companies' premises, at the private residences of company employees and on vehicles.

A dawn raid requires a sufficient initial suspicion that competition law has been infringed, a likelihood of finding evidence at the place in which the inspection takes place and that the action is proportional to the suspected offence. It must be based on a written warrant signed by a member of the presidium of the ComCo. Regularly, dawn raids are conducted upon opening of a formal investigation.

The company is not obliged to co-operate with the authority upon the dawn raid, but it is obliged to tolerate the dawn raid. The Secretariat considers that the obligation to tolerate the dawn raid also comprises an obligation to open premises and provide passwords.

The company concerned has a right to be represented by outside counsel upon such a dawn raid. Legal literature mostly suggests that the company needs to be granted a short grace period for outside counsel to arrive (eg, 30 minutes) before the dawn raid is started. However, the Secretariat considers it not necessary to await the arrival of outside counsel before it starts the dawn raid.

2.3 Restrictions on Dawn Raids

In a dawn raid, the Secretariat can seize hard copies of documents (although it will usually take copies only) and electronic documents and emails. Electronic documents and emails are regularly collected by way of "mirroring" (ie, making a forensically valid copy of) the data on the company's servers and computers of specific employees (custodians). For this purpose, members of the Secretariat are accompanied by IT forensics specialists (eg, of the police of the canton where the dawn raid takes place or of the federal police).

As to the subject matter of the seized documents, the Secretariat considers it is sufficient that they are potentially relevant for the purposes of the investigation. At the same time, the scope of the seizure is limited by the principle of proportionality (requiring that the measure is suitable, necessary and reasonable to achieve the intended goal) and the attorney-client privilege (see **2.12 Attorney-Client Privilege**).

2.4 Spoliation of Information

It is a criminal offence to prevent a public authority from carrying out an act that is one of their official duties (Article 286 of the Criminal Code). Spoliation of evidence by removing, destroying or deleting potentially relevant information may meet the elements of this offence.

In addition, the Secretariat is of the opinion that a potential spoliation of information may be considered an aggravating factor upon the determination of the undertaking's fine.

2.5 Procedure of Dawn Raids

The Secretariat may interview company employees during the dawn raid or thereafter. As to the form of the interview, the Secretariat distinguishes between party examination and witness examination. All formal corporate bodies of the company (in the case of a corporation in particular, the members of the board) as well as the higher management are interviewed in the form of party examination. All other employees and former employees are interviewed in the form of witness examination.

The distinction is particularly relevant for the question of whether the interviewee has an obligation to provide information. In the case of a party examination, the interviewee has a right to remain silent (but the Secretariat considers him or her obliged nevertheless to appear before the Secretariat). A person interviewed as a witness has an obligation to testify. In the case of lack of co-operation, a witness may be summoned to testify and/or may be fined.

Interviews with employees usually take place at the premises of the ComCo or, exceptionally, at the company's premises or at another place. In recent cases, the Secretariat has requested that interviews with company employees be conducted either on site at the company's premises or at a police station, during a dawn raid or very shortly thereafter. If the interviewee requests legal counsel to be present upon the interview, the Secretariat normally grants a preparation time of no less than four hours after the commencement of the dawn raid.

Upon the dawn raid or shortly thereafter, the company receives copies of all documents seized by the Secretariat. In the case of hard copies seized or copied, the company receives an electronic copy of scanned documents. In the case of electronic copies and emails seized by the Secretariat, the company receives its own copy of the mirrored data.

In the case of interviews, minutes are drafted by the Secretariat during the interview to be signed by the interviewee at the end. The interviewee receives a copy of the protocol.

2.6 Role of Counsel
Any officers or employees interviewed have a right to be represented and accompanied by their individual counsel. Counsel for the company may attend the interviews as well.

In the view of the Secretariat, counsel shall not provide replies instead of the interviewee, but shall fulfil its function (eg, by asking supplementary questions). The Secretariat therefore routinely requests counsel to be seated behind the interviewee, rather than next to him or her, in order to avoid answers of interviewees being influenced by counsel.

2.7 Requirement to Obtain Separate Counsel
Under Swiss law, counsel may potentially represent both individuals (officers or employees of the company) as well as the company, provided that such fact is disclosed to all parties and there is no conflict of interests. Nevertheless, it is generally advisable to seek independent legal advice for individuals and the company, as the sanctions for individuals and the company in the event that cartel conduct is confirmed differ. The Secretariat considers it generally inadmissible that company counsel at the same time acts as individual counsel of the interviewee.

2.8 Initial Steps Taken by Defence Counsel
Upon a dawn raid, with which formal investigations are typically opened, initial steps of defence counsel include ensuring the following are taking place:

- the search warrant as well as the identities of the inspectors shall be verified and copied;
- the employees do not prevent or impede the search; and
- the inspectors are granted access while being accompanied.

Upon a dawn raid, it also needs to be quickly assessed whether the company shall file a leniency application. If a leniency application (marker) is being made, the undertaking has immediately to co-operate fully with the competition authorities to have the benefits of leniency (see **2.17 Leniency, Immunity and/or Amnesty Regime**).

Furthermore, defence counsel shall claim sealing of all documents that must not be seized, in particular as they are subject to the attorney-client privilege (see **2.12 Attorney-Client Privilege**) or personal secrecy (such as files on employees).

2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony
Parties to agreements, undertakings with market power and affected third parties must provide the competition authorities with all information required for their investigations and produce the necessary documents (Article 40, Cartel Act). The Secretariat can send to companies requests for documents or information (eg, questionnaires requesting information on specific conduct or, more generally, on a market).

An obligation to produce documents principally applies to all documents that are relevant for the investigation of competition authorities. This obligation is limited by the principle of proportionality and by privileges (attorney-client privilege, privilege against self-incrimination; see **2.12 Attorney-Client Privilege** and **2.13 Other Relevant Privileges**).

2.10 Procedure for Obtaining Other Types of Information
In addition to documents (obtained through dawn raids or requests for information), the ComCo mainly uses responses to questionnaires and interviews as elements of proof for the alleged cartel conduct.

2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions
In the opinion of the Secretariat, the competence of the competition authorities to seize documents or other evidence during a dawn raid pertains to all evidence accessible in the premises of the company that is subject to the dawn raid ("accessibility principle"). Therefore, electronic documents may also be seized if they are located on servers abroad, provided they can be accessed from the company's premises. The same principle is in practice applied to the scope of companies to produce documents.

A further-reaching obligation to produce documents that are not accessible from Switzerland applies when the company has filed for leniency and thus is required to co-operate fully with the competition authorities.

2.12 Attorney-Client Privilege
Any objects and documents pertaining to the communication between a company and its external counsel must not be seized and need not be produced by the company (attorney-client privilege). The attorney-client privilege applies to a company's external counsel if it is authorised to represent parties in front of courts in Switzerland, but not to a company's in-house counsel. The attorney-client privilege applies to documents regardless of where they are located (ie, including documents located in the premises of the company).

Where the existence of legal privilege is in dispute, a company may request that the document(s) in question be sealed, pending a decision of the Federal Criminal Court on whether it may be seized and analysed. In the view of the Secretariat, it remains permissible that they make a summary assessment of the document in order to evaluate the existence of legal privilege.

2.13 Other Relevant Privileges

The obligation of a company to produce documents, and of interviewees interviewed in the form of party examination to provide information, is limited by the privilege against self-incrimination (nemo tenetur principle), where proceedings relate to sanctionable cartel behaviour and thus qualify as criminal proceedings under the ECHR (see **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**). However, the scope of the privilege against self-incrimination has not yet been fully determined by the Federal Supreme Court.

In the case of a witness examination, the right to refuse to provide information applies only where the interviewee would risk criminal prosecution, a severe reputational disadvantage or a proprietary damage for themselves or close relatives. (As to the distinction between party and witness examination, see **2.5 Procedure of Dawn Raids**.)

2.14 Non-cooperation with Enforcement Agencies

Individuals and firms commonly comply with requests for documents or information, potentially after discussion with the Secretariat on adequate limitations of the request. If a company does not comply with a request for a document or information, the company may be fined up to CHF100,000 and the responsible individual up to CHF20,000.

2.15 Protection of Confidential/Proprietary Information

Principally, evidence that forms part of the investigation (other than evidence submitted by a potential leniency applicant) is available to all parties to the ComCo's investigation, which may also include companies that did not, allegedly, participate in the cartel (but, according to the practice of the Federal Administrative Court, not those companies that have been damaged by cartel conduct). However, the competition authorities are bound by the rules on official secrecy (Article 25(1), Cartel Act). Companies can thus claim confidentiality with respect to specific facts constituting business secrets, also vis-à-vis other parties to the investigation. The mere fact of an involvement in an infringement of competition does not constitute a business secret.

Due to the lack of precedent, it is not clear whether a plaintiff that was not a party to the ComCo's investigation may successfully demand the disclosure of evidence collected through use of investigative powers in a private damage action. To date, there are no known precedents where evidence collected through the use of investigative powers would have been discovered in a private damage action.

In a set of decisions, the Federal Administrative Court has granted public authorities (canton and community) limited access to the investigation file of a bid-rigging case. File access was granted to the extent necessary for the authorities to assess potential sanctioning under procurement law or the enforcement of damage claims, and excluded the file of the leniency applicant (cases A-6315/2014, A-6320/2014 and A-6334/2014, all dated 23 August 2016). More recently, the Federal Administrative Court had the opportunity to refine this decisional practice in so far that it set the legal force of the cartel decision as a necessary precondition to evaluate whether access to file is necessary for the authorities to assess the enforcement of damage claims (case A-592/2018).

Special rules apply to the access to information submitted by a leniency applicant (as to leniency, see **2.17 Leniency, Immunity and/or Amnesty Regime**). In the case of a leniency application that is not anonymous, confidential treatment is usually afforded to the applicant, at least until an investigation has been opened and dawn raids have been conducted. At a certain point in the investigation, possible (co-)defendants will be entitled to due process and will therefore be granted access to the file. In practice, the Secretariat grants access to the file of the leniency applicant only in its premises and does not allow any copies to be made. This occurs at the latest when the statement of objections is issued. At this stage of the investigation, the identity of the leniency applicant will become known to the parties to the investigation. Once the decision of the ComCo is published, the identity of the leniency applicant will become publicly known, at least indirectly, because no fine is imposed on the leniency applicant.

2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement

Defence counsel may raise legal and factual arguments towards the competition authorities throughout the investigation proceedings (or a potential preliminary investigation). In particular, defence counsel has a right to consult and comment upon the case files, to suggest hearings of the party and witnesses and to participate in such hearings. Defence counsel may comment upon the draft decision that the Secretariat produces based on the investigation, and upon a potential hearing summoned by the ComCo.

2.17 Leniency, Immunity and/or Amnesty Regime

The Cartel Act provides for a leniency regime, which is based on Article 49a(2) and is specified in detail in the Sanctions Ordinance. As a general principle, a sanction (ie, fine) may be waived by the ComCo if an undertaking assists in the discovery and elimination of the restraint of competition.

In order to receive full immunity, an undertaking must (i) report its own participation in a restraint of competition (in the sense described in Article 5(3) and/or 5(4) of the Cartel Act), and (ii) must be the first undertaking either (a) to provide

information that enables the ComCo to open an investigation, or (b) to provide evidence that enables the ComCo to establish an infringement of competition in accordance with Article 5(3) or 5(4) of the Cartel Act (Article 8(1), Sanctions Ordinance).

Immunity is granted only if the company:

- has not coerced any other undertaking into participating and has not played the instigating or leading role;
- voluntarily submits to the ComCo all available information and evidence within its sphere of influence;
- continuously co-operates with the ComCo throughout the procedure, without restrictions or delay; and
- ceases its participation in the infringement upon submitting its leniency application or upon being ordered to do so (Article 8(2), Sanctions Ordinance).

In practice, the Secretariat accepts relatively general information for a marker (without evidence being submitted), provided that the company subsequently provides further, more detailed information and specifies its leniency application. In the view of the Secretariat, the marker needs to contain as a minimum the following:

- contact details for the undertaking applying for immunity;
- a statement that the undertaking co-ordinated its behaviour with that of other undertakings with the object and/or effect to restrain competition in any way;
- a statement that the undertaking intends to submit a voluntary report;
- indications about the restriction of competition that could be identified with reasonable effort at the moment it applied for the marker;
- date and signature.

Following receipt of the marker, the Secretariat sets the undertaking a deadline to submit its voluntary report.

Full immunity from fines is granted only to the first company reporting to the ComCo. For "second-in-the-door" companies and latecomers, a reduction of the fine by up to 50% is available if a company voluntarily co-operates in a proceeding and, at the time the evidence is submitted, has ceased participation in the anti-competitive practice (Articles 12(1) and 12(2), Sanctions Ordinance). The importance of the company's contribution to the success of the proceedings is decisive in determining the amount of the reduction of the fine.

Besides, a reduction of the fine by up to 80% is available if a company voluntarily provides information or submits evidence on further infringements on competition in accordance with Article 5(3) and (4) of the Cartel Act (Article 12(3), Sanctions Ordinance).

The company seeking a reduction of the fine must submit to the ComCo all necessary information on the reporting company itself, on the nature of the reported infringement of competition, on the other companies participating in the infringement of competition and on the affected or relevant markets (Article 13, Sanctions Ordinance).

There is no limit to the number of companies that are eligible for a reduction of the fine. Accordingly, in principle, not only is the "second-in-the-door" company eligible for a reduction of the fine, but this principle applies to any other reporting company that fulfils the conditions. However, since the reduction depends on the company's contribution to the success of the investigation, in general it is unlikely that companies co-operating at a later stage of the proceedings (when the ComCo may already have sufficient information) will be able to profit from a substantial reduction, if any.

Therefore, there is ex ante transparency with regard to the conditions for a reduction in the fine and the range of the reduction (but not the specific reduction that will ultimately be granted).

3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds

3.1 Obtaining Information Directly from Employees

The Secretariat may interview company employees. All formal corporate bodies of the company and the higher management are interviewed in the form of party examination, which means that they can refuse to provide information. All other employees and former employees are interviewed in the form of witness examination and thus principally have an obligation to provide information (see **2.5 Procedure of Dawn Raids** for further detail).

3.2 Obtaining Documentary Information from Target Company

Parties to agreements, undertakings with market power and affected third parties are obliged to provide the competition authorities with all the information required for the investigation and produce the necessary documents. The obligation is limited by the principle of proportionality, the attorney-client privilege (see **2.12 Attorney-Client Privilege**) and the privilege against self-incrimination (see **2.13 Other Relevant Privileges**).

3.3 Obtaining Information from Entities Located Outside this Jurisdiction

The obligation under the Cartel Act to provide the competition authorities with requested information and to produce requested documents is not explicitly limited to companies located in Switzerland. However, any measures taken against the refusal to provide requested information or documents will in practice be unenforceable where a company is located outside (and does not have any presence in) Switzerland. In practice, the Secretariat sends its information requests both to foreign companies directly and to their Swiss subsidiaries.

3.4 Inter-agency Co-operation/Co-ordination

The Secretariat as the investigating body is separate from the ComCo as the decision-taking body. In practice, the two authorities regularly interact as, for example, a member of the presidium of the ComCo needs to approve the opening of an investigation or the conduct of a dawn raid. There are no rules limiting the exchange of information between the ComCo and the Secretariat.

In view of the interactions between the ComCo and the Secretariat, concerns have been voiced that the separation between the investigating body and the deciding body is mere theory, and that the ComCo does not exercise effective judicial control over the Secretariat.

3.5 Co-operation with Foreign Enforcement Agencies

There is no general legal framework that would allow the ComCo to co-operate with foreign competition authorities, but there are several specific agreements on international co-operation in force. Most importantly, Switzerland and the European Union are parties to an agreement relating to co-operation on the application of their competition laws (Co-operation Agreement), which entered into force in 2014. The Co-operation Agreement is a second-generation agreement in that it allows, inter alia, the transmission of information and documents between the ComCo and the European Commission even without the consent of the company concerned.

In addition, there are currently three further agreements on international co-operation in existence. An agreement between Switzerland and the European Community on Air Transport, dated 21 June 1999, provides for co-operation of the ComCo with the EU authorities. Also, free trade agreements between Switzerland and Japan (concluded in 2009) and between Switzerland and China (concluded in 2013) contain basic provisions on co-operation between the competition authorities of both countries.

Finally, the ComCo has regular contact with foreign competition authorities on a general, non-case-specific basis – for example, in the framework of the International Competition Network.

3.6 Procedure for Issuing Complaints/ Indictments in Criminal Cases

Public enforcement of competition law is implemented in administrative proceedings, even though the sanctions imposed qualify as criminal in nature under the EHCR. As to the steps of the administrative proceedings, see **2.1 Initial Investigatory Steps**.

3.7 Procedure for Issuing Complaints/ Indictments in Civil Cases

Civil enforcement of competition law in Switzerland is limited to private civil litigation (see **5. Private Civil Litigation Involving Alleged Cartels** for further details on private civil litigation).

3.8 Enforcement Against Multiple Parties

Enforcement actions are regularly brought against multiple parties in single proceedings, and the ComCo takes a decision in a single order. If one party enters a settlement with the ComCo during pending proceedings, proceedings will be closed for that party separately with a partial order and continued for the other parties (so-called sequential hybrid proceedings).

3.9 Burden of Proof

According to the inquisitorial principle, which applies in administrative proceedings in general and investigations into cartel behaviour in particular, the competition authorities and the courts have to investigate the facts ex officio. They bear the burden of proof for the alleged cartel behaviour.

As the sanctions (ie, fines) of the Cartel Act are criminal in nature (see **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**), the procedural guarantees of Articles 6 and 7 of the ECHR (and of Articles 30 and 32 of the Swiss Federal Constitution) apply. Accordingly, the standard of proof to be discharged in cartel cases that may lead to the imposition of a fine is "proof beyond reasonable doubt". This is the case for the types of horizontal agreements set forth in Article 5(3) of the Cartel Act, the types of vertical agreements described in Article 5(4) of the Cartel Act, and the abuse of a dominant position in the sense of Article 7 of the Cartel Act. With respect to market definition and questions of substitutability, which require proof of complex factual circumstances, the Federal Supreme Court ruled that the requirements for proving such connections must not be overstated, because exact proof would hardly be possible (judgment 139 (2012) I 72 – Publigroupe).

In cartel cases that may not lead to the imposition of a fine (ie, unlawful agreements in the sense of Article 5(1) of the Cartel Act that do not fall under the types of agreements set forth in Article 5(3) or 5(4) of the Cartel Act), the ComCo considers that a lesser standard of proof of "preponderance of the evidence" applies.

3.10 Finders of Fact
In public enforcement proceedings, the Secretariat acts as the fact-finding body and conducts the investigation. It presents a draft decision to the ComCo, which issues the order and applies the law to the facts.

3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings
It has so far not been decided whether, and under what circumstances, a third party that was not part of the investigation of the ComCo may claim disclosure of evidence of such investigation for the purpose of private civil litigation. The ComCo is under no express obligation to co-operate and provide assistance to civil courts. In principle, such claim could be based on the rules of document production under the Code of Civil Procedure, or the right of information under the Data Protection Act.

In a special setting, the Federal Administrative Court has recently granted public authorities limited access to the investigation file of a bid-rigging case. File access was granted to the extent necessary for the authorities to assess potential sanctioning under procurement law or the enforcement of damage claims, and excluded the file of the leniency applicant (cases A-6315/2014, A-6320/2014 and A-6334/2014, all dated 23 August 2016, see **2.15 Protection of Confidential/Proprietary Information**).

Special rules apply to access to the information submitted by a leniency applicant. The ComCo aims at protecting such information in order to maintain the companies' incentives to submit leniency applications intact, therefore strictly limiting the access to such information (see **2.15 Protection of Confidential/Proprietary Information**).

3.12 Rules of Evidence
Under Swiss law, the principle of free appraisal of evidence applies in that there are no formal rules as to the evidentiary value of certain means of proof. Limits arise under the constitutional right of due process of law according to which, for example, competition authorities must not rely on means of proof that have not been made accessible to the companies concerned.

3.13 Role of Experts
In competition proceedings, experts relied upon are regularly economists. External economists may provide reports on behalf of parties subject to an investigation into cartel conduct. Such reports are regularly commissioned in relation to questions of whether allegedly competitive behaviour had the effect of restricting competition, whether such effect was significant, or whether a significant effect may be justified on grounds of economic efficiency. The ComCo has issued guidelines for such economic expert reports.

3.14 Recognition of Privileges
The taking of evidence by the competition authorities is subject to the attorney-client privilege (see **2.12 Attorney-Client Privilege**) and, in proceedings that may lead to fines for the undertakings concerned, the privilege against self-incrimination (see **2.13 Other Relevant Privileges**).

3.15 Possibility for Multiple Proceedings Involving the Same Facts
It is within the discretion of the competition authorities whether or not to divide up related facts into different proceedings. By way of example, investigations into bid-rigging of construction companies in the canton of Graubünden have been divided up into several proceedings according to the geographic scope of the alleged cartel, although the same companies are (in part) affected.

4. Sanctions and Remedies in Government Cartel Enforcement

4.1 Imposition of Sanctions
Sanctions are imposed by the ComCo, the decision-making authority. The Secretariat assists the ComCo in the preparation of its decision, but cannot itself impose sanctions.

4.2 Procedure for Plea Bargaining or Settlement
If the Secretariat considers that a restraint of competition is unlawful, it may propose an amicable settlement to the companies involved concerning ways to eliminate the restraint (Article 29(1), Cartel Act). The amicable settlement is to be formulated in writing and approved by the ComCo (Article 29(2), Cartel Act). The instrument of an amicable settlement is often used in practice.

An amicable settlement under Swiss law is broadly comparable to an EU type of settlement (but more important in practice), rather than to the US style of plea bargaining. The Secretariat proposes the wording for a settlement, in particular the wording for certain commitments of the company in respect of compliance with competition law in the future. In addition, the settlement generally contains the range of fines that the Secretariat will ask the ComCo to impose. While actual "plea bargaining" is not anticipated, discussions with the Secretariat may neverthe-

less be used by companies in order to discuss a reduction of the fine that the Secretariat will request that the ComCo impose, in return for commitments of the parties and at least an implicit acknowledgement of the unlawfulness of the conduct under discussion. In practice, reductions of the fine of up to 50% have been granted. Furthermore, the Secretariat, at least implicitly, expects that the company will not submit an appeal against the ComCo decision confirming the amicable settlement. Upon its conclusion, the amicable settlement is binding on the company, but becomes effective only when approved by the ComCo. The breach of an amicable settlement is subject to a fine for the company (of up to 10% of its Swiss turnover in the preceding three financial years) and criminal sanctions for the responsible individual (fine of up to CHF100,000).

4.3 Collateral Effects of Establishing Liability/ Responsibility

The establishment of cartel behaviour by the ComCo does not have any legally prejudicial effect upon potential private civil litigation. However, it is conceivable that there is a relevant factual effect of prejudice if a decision of the ComCo establishing cartel behaviour has become final and binding.

According to the Swiss Public Procurement Act, a procuring authority may exclude companies from a procurement procedure or delete them from a list of qualified companies in the event of cartel conduct. Furthermore, several cantonal procurement acts provide for a possible ban of several years for companies having committed illegal cartel conduct.

4.4 Sanctions and Penalties Available in Criminal Proceedings

Administrative sanctions (fines) – qualifying as criminal sanctions in the meaning of the ECHR – can be imposed on companies for participation in an unlawful agreement pursuant to Article 5(3) and/or 5(4) of the Cartel Act and for the abuse of a dominant position in the sense of Article 7 of the Cartel Act (Article 49a(1), Cartel Act). In addition, sanctions can be imposed for the breach of an amicable settlement, a final and non-appealable ruling of the competition authorities, or a decision of an appellate body (Article 50, Cartel Act).

The maximum amount of fines is 10% of the (group) turnover achieved by the company (and its group) in Switzerland in the preceding three financial years (Article 49a(1) and Article 50, Cartel Act). In determining the amount of the fine, due account shall be taken of the profit likely to have resulted from the unlawful behaviour (Article 49a(1) and Article 50, Cartel Act).

The actual amount of the fine is calculated as follows (Sanctions Ordinance, Article 2 and following, in detail): a so-called basic amount is set at up to 10% (in most cases decided by the ComCo it is 5% to 7%) of the turnover in the affected relevant markets in Switzerland during the preceding three financial years. This basic amount can be increased depending on the duration of the infringement. It is further increased in the case of aggravating circumstances and reduced in the case of mitigating circumstances. However, in no case is the fine to exceed the maximum amount described in the preceding paragraph.

The ComCo may further impose an administrative sanction of up to CHF100,000 on a company that does not entirely fulfil its obligation to provide information or produce documents (Article 52, Cartel Act).

Criminal sanctions can be imposed on the responsible individual(s) for wilful violations of an amicable settlement, a final and non-appealable ruling of the competition authorities or a decision of an appellate body (a fine not exceeding CHF100,000). In addition, company employees who wilfully do not comply completely with a ruling of the competition authorities in respect of the obligation to provide information will be liable to a fine not exceeding CHF20,000 (Article 55, Cartel Act).

Swiss competition law does not provide for sanctions for individuals for violation of competition law by participation in an unlawful agreement pursuant to Article 5(3) and/or 5(4) of the Cartel Act or in an abuse of a dominant position in the sense of Article 7 of the Cartel Act. Furthermore, Swiss competition law does not provide for the imprisonment of company employees (such as managers or employees participating in a cartel).

4.5 Sanctions and Penalties Available in Civil Proceedings

Civil enforcement of competition law in Switzerland is limited to private civil litigation (see **5 Private Civil Litigation Involving Alleged Cartels**).

4.6 Relevance of "Effective Compliance Programmes"

There is no statutory provision establishing that the existence of a compliance programme affects the level of a fine. While legal literature proposes that its existence shall be taken into account as a mitigating factor, the ComCo has in its practice been reluctant to do so, which has so far not been overruled by the courts.

4.7 Mandatory Consumer Redress

There is no basis for the sanctions to extend to mandatory consumer redress.

4.8 Available Forms of Judicial Review or Appeal

Decisions by the ComCo (or, exceptionally, by the Secretariat) are subject to judicial review by the Federal Administrative

Court upon appeal within 30 days of receipt. This appeal can be filed either by:

- the company (ie, a cartel member or dominant undertaking) in the case of a finding against it; or, exceptionally
- a third party who has:
  - (a) participated, or been refused the opportunity to participate, in the proceedings before the ComCo or the Secretariat;
  - (b) been specifically affected by the decision; and
  - (c) an interest that is worthy of protection in the revocation or amendment of the decision.

The Federal Administrative Court has full jurisdiction to review the ComCo's findings of fact, legal assessment and sanctions/penalties, under all aspects of fact and law. However, the Federal Administrative Court exercises restraint with regard to the review of technical factual questions. The Federal Supreme Court accepts this restraint and considers it compatible with the procedural guarantees of the ECHR (see **3.9 Burden of Proof**).

The decision of the Federal Administrative Court is subject to a further appeal to the Federal Supreme Court within 30 days. This appeal can be filed:

- by the company, in the event of a finding against it;
- by a third party, if the requirements set out above are fulfilled; or
- by the Federal Department of Economic Affairs, Education and Research, if the Federal Administrative Court has revoked the decision by the ComCo.

The Federal Supreme Court can review the appeals decision of the Federal Administrative Court only with respect to its conformity with the law. It is bound by the facts that have been established before the Federal Administrative Court, unless they are manifestly incorrect or have been determined in violation of legal provisions.

The decision relating to the unsealing of documents that were seized in a dawn raid and subsequently sealed upon the company's request (see **2.8 Initial Steps Taken by Defence Counsel**) is, exceptionally, made by the Federal Criminal Court, at the request of the Secretariat. This decision is subject to an appeal before the Federal Supreme Court.

5. Private Civil Litigation Involving Alleged Cartels

5.1 Private Right of Action

A party that is hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request:

- the elimination of or desistance from the hindrance;
- damages and satisfaction in accordance with the general provisions of the Code of Obligation; and
- the surrender of unlawfully earned profits in accordance with the provisions on agency without authority (Article 12(1), Cartel Act).

These claims may be brought by companies. Conversely, it is generally considered (although no precedents are known in this respect) that end customers, in particular consumers, have no standing to sue.

There is no threshold requirement for a civil action based on alleged cartel behaviour. Proceedings in competition law matters are initiated with the submission of the statement of claim at the competent court.

Local jurisdiction of courts in Switzerland for competition law matters is determined according to the general rules for civil proceedings. Jurisdiction differs depending on whether the matter qualifies as an international or national case, and whether claims are made under tort law or contract law.

As regards substantive jurisdiction, the Swiss Code of Civil Procedure provides that every canton has to determine one court where competition matters are heard. In cantons that have a commercial court (Zürich, Bern, Aargau and St. Gallen), such court is competent for competition law matters. In all other cantons, competition law matters are to be brought to the cantonal appellate court.

Under both private civil litigation and governmental proceedings, elimination of or desistance from the restraint of competition may be ordered. Governmental proceedings may impose fines with a deterrent effect, while financial relief under civil litigation is limited to the compensation of actual damage or surrender of actual profits.

Based on general principles of Swiss law, a tort law claim for damages based on Article 41 of the Code of Obligations requires the following elements to be fulfilled:

- an unlawful act by the liable party (ie, a cartel member or dominant undertaking);
- a damage suffered by the claiming party (eg, a customer);

- a causal connection between the wrongful act and the damage; and
- fault of the liable party (at least negligence).

All elements have to be proven by the claiming party.

Claimants in a civil damage claim can ask for compensatory damages (ie, compensation for losses and forgone profits caused by the cartel). Punitive damages (ie, damages in excess of the actual damage incurred by the claimant) are not provided for in Swiss law. Pursuant to Swiss principles on the conflict of laws, punitive damages may not be awarded by Swiss courts even if a claim based upon a restraint of competition is subject to foreign law that provides for punitive damages (Article 137(2) of the Federal Act on Private International Law).

Civil enforcement of competition law has so far played a limited role in Switzerland, for a number of reasons: a private claimant may instigate proceedings only on its own behalf, bears the burden of proof and the financial risk (court costs, compensation of the defendant, their own attorneys' fees) if they lose a civil claim, and faces considerable evidentiary hurdles to prove the cartel behaviour.

There are only very few cases relating to civil damage claims, due to the notoriously difficult proof of damage and of a causal nexus between the wrongful act and the damage. Claims as to elimination of or desistance from cartel behaviour that do not require such proof are somewhat more common, but still rather limited.

5.2 Collective Action

Swiss law does not offer means of collective redress, either in the form of genuine "class actions" or in the form of actions brought by consumer groups or other institutional organisations representing specific interest groups, unless they have been assigned the claims of individuals.

5.3 Indirect Purchasers and "Passing-On" Defences

Indirect purchasers can bring a damage claim, unless they qualify as consumers (see **5.1 Private Right of Action**).

While there are no known precedents to date, it is generally considered that defendants (ie, participants in a cartel or a dominant undertaking abusing its dominance) may raise a "passing-on" defence against claims brought by direct purchasers. Since consumers are generally considered to have no standing to sue, it is possible that defendants will not be liable for civil damages in a case of the "passing on" of the increased price by direct purchasers.

5.4 Admissibility of Evidence Obtained from Governmental Investigations/Proceedings

The general rules of document production in civil procedure apply to evidence from governmental investigation or proceedings into cartel behaviour. Under Swiss law of civil procedure, there is no pre-trial discovery, as known in common law jurisdictions. The court will order a litigant or a third party to produce documents requested by a party where, among others, the documents are sufficiently described. This is often a significant hurdle for claimants in cartel matters, as they have not been involved in the governmental proceedings and thus cannot specifically describe potential documentary evidence of cartel behaviour.

5.5 Frequency of Completion of Litigation

There are no figures available for the settlement quota for competition law matters. As a general proposition, settlement is fairly common in Switzerland – for example, approximately 65% of all cases are settled at the Commercial Court of Zürich.

Upon receipt of the statement of claim, the court normally orders the claimant to provide a cost advance (and, in certain matters, security for party costs of the defendant). The court then serves the defendant with a copy of the statement of claim and sets a deadline for the defendant to submit a statement of defence. Depending on the circumstances, the court may order a second exchange of briefs. After the parties have made their factual assertions and offered evidence, the court proceeds to the taking of evidence (eg, production of documents, hearing of witnesses and filing of expert reports), upon which the parties may comment in the last phase of proceedings.

5.6 Compensation of Legal Representatives

Attorneys for successful claimants are compensated in that the court obliges the losing defendant(s) to repay the prevailing claimant for the cost of party representation. The compensation for party representation is determined and allocated ex officio according to the applicable tariff. Each canton has its own tariff that is normally based on the amount in dispute and the complexity of the proceedings. The compensation therefore varies from canton to canton.

5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

Generally, the losing party must bear procedural costs. Procedural costs consist of court costs (judgment fee, costs of evidence-taking) and party costs (costs of legal representation and expenses). The amount of procedural costs is based on the applicable tariff. Each canton has its own tariff that is normally based on the amount in dispute and the complexity of the proceedings. Procedural costs thus vary from canton to canton.

5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

The decision of the court of first instance may be appealed to the Federal Supreme Court. The grounds for appeal are limited to infringements of federal law, international public law and constitutional law. The Federal Supreme Court is bound by the facts established by the court of first instance, unless they are manifestly erroneous. As a general proposition, new facts and evidence may not be submitted.

6. Supplementary Information

6.1 Other Pertinent Information

There is no other pertinent information.

6.2 Guides Published by Governmental Authorities

The ComCo and the Secretariat have published a number of communications and guidance documents relating to cartel conduct and enforcement, partly available in English at the following link: www.weko.admin.ch/weko/en/home/documentation/communications.html.

7. COVID-19

7.1 Cartels and COVID-19

The ComCo has reminded undertakings in a press release in March 2020 that it will not tolerate that businesses use COVID-19 as an excuse to build cartels and agree on prices, and that it will use enforcement measures in such cases. The ComCo does not, however, target legitimate forms of co-operation to ensure an efficient distribution of scarce goods to consumers. Such co-operation is legitimate if it is limited to what is necessary to achieve the goal, limited in time to the crisis, and does not exclude effective competition.

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