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LAW AND PRACTICE: p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

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Law and Practice

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Homburger is one of the largest Swiss law firms, with more than 150 lawyers. The Competition and Regulatory team comprises more than 15 lawyers. It advises domestic and international clients on Swiss and European competition law and regulatory matters and represents them before the Swiss Competition Commission, the EU Commission and other courts and administrative authorities. Furthermore, it advises its clients on administrative law and on questions relating to market regulation. It represents them before administrative authorities and courts, particularly in the areas of procurement law, energy, health and pharma, media and telecommunications, infrastructure and transport, international trade as well as administrative law.

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1. Basic Legal Framework

1.1 Statutory Basis/Bases for Challenging Cartel Behaviour

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 (Articles 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

Public enforcement of the Cartel Act is the responsibility of the Competition Commission (ComCo) and its Secretariat (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 72 employees (60.9 FTE) as per the end of 2017.

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

1.3 Private Right of Action for Challenging Cartel Behaviour

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: (i) the elimination of or desistance from the hindrance; (ii) damages and satisfaction in accordance with the rules of the Swiss Code of Obligations (CO); and (iii) 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 Potential Liability

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.

1.5 Statutes Indirectly Taking Account of Alleged Cartel Behaviour

From the perspective of contract law, agreements that infringe competition law are entirely or partly void. If only part of an agreement infringes competition law, only those terms alone are void, unless there is cause to assume that the agreement would not have been concluded without them.

Abusive prices that are not the result of effective competition may be prevented or terminated by the Price Regulator under the Price Monitoring Act.

1.6 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) (see **1.7 Variety of Competition Law Violations** for further detail on these two categories).

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.

1.7 Variety of Competition Law Violations

Cartel behaviour comprises unlawful agreements affecting competition and unlawful practices by dominant undertakings.

As regards 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 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 recently confirmed by the Federal Supreme Court (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.

As regards 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) 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).

1.8 Limitations Period(s)

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 para 2 lit 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). However, this practice has so far not been explicitly confirmed by the Swiss courts.

1.9 Industries, Sectors or Other Activities Exempt from Scrutiny Under Statutes or Precedent

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).

1.10 Limits on the Exercise of Personal Jurisdiction Over Alleged Cartel Participants

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 recently 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 (143 (2016) II 297 – *Gaba*).

The ComCo considered, for example, that a provision in a foreign distribution agreement which 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 (2C_63/2016 – *BMW*).

1.11 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 (see **1.10 Limits on the Exercise of Personal Jurisdiction Over Alleged Cartel Participants**), 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 cooperation on the application of their competition laws that entered into force in 2014 (Cooperation Agreement). The Cooperation 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 Cooperation 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, regularly after having held a hearing of the parties.

2.2 Dawn Raids or Surprise Visits

The competition authorities are allowed to conduct surprise visits (so-called '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 the proportionality of the dawn raid. 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 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 or Surprise Visits

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 and the attorney-client privilege (see **2.13 Principles of Attorney-client Privilege**).

2.4 Obligations to Prevent or Avoid Spoliation of Potentially Relevant Information

It is a criminal offence to prevent a public authority from carrying out an act which is one of their official duties (Article 286 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 Responding to Interviews/Questions During the Dawn Raid or Surprise Visit

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 relevant in particular 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 may take place at the premises of the ComCo (which is usually the case) or, exceptionally, also 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.

2.6 Companies/Interviewees Obtaining Copies of Documents

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.

2.7 Right to 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.

2.8 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 in-

admissible that company counsel at the same time acts as individual counsel of the interviewee.

2.9 Principal Initial Steps Undertaken by the 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: (i) the search warrant as well as the identities of the inspectors shall be verified and copied; (ii) the employees do not prevent or impede the search; and (iii) 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 benefit from the benefits of leniency (see **2.18 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 **2.13 Principles of Attorney-Client Privilege**) or personal secrecy (such as files on employees).

2.10 Obtaining Documentary Evidence or 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 (in particular, so-called 'questionnaires', in which information on specific conduct or more generally on a market is requested).

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 **2.13 Principles of Attorney-Client Privilege** and **2.14 Other Recognised Privileges**).

2.11 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.

2.12 Obligation to Produce Documents or Other Evidence

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

2.13 Principles of 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.

2.14 Other Recognised 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 **1.4 Potential Liability**). However, 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 Responding to Interviews/Questions During the Dawn Raid or Surprise Visit**.)

2.15 Resisting Initial Requests for Information

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.

2.16 Protecting Confidential or 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 recent 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).

Special rules apply to the access to information submitted by leniency applicant (as to leniency, see **2.18 Leniency, Immunity and/or Amnesty Regime**). In the case of a leniency application which 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.

2.17 Persuading the Enforcement Agency to Modify Its Enforcement Action

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.

2.18 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) 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) Cartel Act (Article 8(1) Sanctions Ordinance).

Immunity is granted only if the company: (i) has not coerced any other undertaking into participating and has not played the instigating or leading role; (ii) voluntarily submits to the ComCo all available information and evidence within its sphere of influence; (iii) continuously co-operates with the ComCo throughout the procedure, without restrictions or delay; and (iv) 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: (i) contact details for the undertaking applying for immunity; (ii) 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; (iii) a statement that the undertaking intends to submit a voluntary report; (iv) indications about the restriction of competition that could be identified with reasonable effort at the moment it applied for the marker; (v) 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.

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 which 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 as regards 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 Seeking Information Directly from Company 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 entails 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 Responding to Interviews/Questions During the Dawn Raid or Surprise Visit** for further detail).

3.2 Seeking Information Directly from the Target Company or Others

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 **2.13 Principles of Attorney-Client Privilege**) and the privilege against self-incrimination (see **2.14 Other Recognised Privileges**).

3.3 Seeking Information Directly from Companies or Individuals Outside the 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, eg, 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 investigating and deciding body is mere theory, and that the ComCo does not exercise effective judicial control over the Secretariat.

3.5 Co-operating with Enforcement Agencies in Foreign Jurisdictions

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 Steps Taken to Issue a Complaint/Indictment Against a Criminal Case

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 Steps Taken to Issue a Complaint/Summons in a Civil Case

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 Actions Against Multiple Parties in a Single Proceeding

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 such party separately with a partial order and continued for the other parties (so-called sequential hybrid proceedings).

3.9 Definition and Application of 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 **1.4 Potential Liability**), 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) Cartel Act, the types of vertical agreements described in Article 5(4) Cartel Act, and the abuse of a dominant position in the sense of Article 7 Cartel Act (see **1.7 Variety of Competition Law Violations**). 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) Cartel Act that do not fall under the types of agreements set forth in Article 5(3) or 5(4) Cartel Act), the ComCo considers that a lesser standard of proof of 'preponderance of the evidence' applies.

3.10 Finder of Fact in Enforcement Proceedings

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 Evidence Obtained in One Proceeding Being Used 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 cooperate 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 recently has 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).

Special rules apply to access to the information submitted by leniency applicant. The ComCo aims at protecting such information in order to maintain the companies' incentives to submit leniency applications intact, and therefore strictly limits the access to such information (see **2.16 Protecting Confidential or Proprietary Information**).

3.12 Application of 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, eg, competition authorities must not rely on means of proof that have not been made accessible to the companies concerned.

3.13 Role Typically Played by Retained 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 for the questions whether allegedly competitive behaviour had the effect of restricting competition, whether such effect was significant, or whether a significant effect may be justified for rounds of economic efficiency. The ComCo has issued guidelines for such economic expert reports.

3.14 Recognised Privileges

The taking of evidence by the competition authorities is subject to the attorney-client privilege (see **2.13 Principle of Attorney-Client Privilege**) and, in proceedings that may lead to fines for the undertakings concerned, the privilege against self-incrimination (see **2.14 Other Recognised Privileges**).

3.15 Multiple or Simultaneous Enforcement Proceedings Involving the Same or Related 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 Graubunden have been divided up into several proceedings according to the geographic scope of the alleged cartel, although partly the same companies are affected.

4. Sanctions and Remedies in Government Cartel Enforcement

4.1 Investigatory Agency Imposing Sanctions Directly

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 of "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 nevertheless be used by companies in order to discuss a reduction of the fine which 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 if Liability or Responsibility is Established

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 case 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 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) Cartel Act and for the abuse of a dominant position in the sense of Article 7 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, Articles 2 and following, in detail): a so-called 'basic' amount is set at up to 10% (in most cases de-

cided 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) Cartel Act or in an abuse of a dominant position in the sense of Article 7 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 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 “Effective Compliance Program”
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 Sanctions Extending to Mandatory Consumer Redress
There is no basis for the sanctions to extend to mandatory consumer redress.

4.8 Forms of Judicial Review or Appeal Available from Decisions in Governmental Enforcement Proceedings
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: (i) by the company (ie a cartel member or dominant undertaking) in the case of a finding against it; or, exceptionally, (ii) by 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 Definition and Application of 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: (i) by the company, in case of a finding against it; (ii) by a third party, if the requirements set out above are fulfilled; or (iii) 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 **2.9 Principal Initial Steps Undertaken by the 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 to Seek Relief
A party that is hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request: (i) the elimination of or desistance from the hindrance; (ii) damages and satisfaction in accordance with the general provisions of the Code of Obligation; and (iii) 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.

5.2 Threshold Requirements

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.

5.3 Actions Styled as “Class Actions” or Other Forms of 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.

5.4 Handling Questions of Indirect Purchasers or “Passing-on” Defences in Private Actions

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

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.

5.5 Process for Hearing and Resolving Claims

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 Evidence from Governmental Investigations or 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 regularly is 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.

5.7 Differences in Standards for Relief in a Private Civil Action and Governmental Proceedings

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.

5.8 Forms of Relief That Can Be Sought by the Claimant

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: (i) an unlawful act by the liable party (ie a cartel member or dominant undertaking); (ii) a damage suffered by the claiming party (eg a customer); (iii) a causal connection between the wrongful act and the damage; and (iv) fault of the liable party (at least negligence). All elements (i) to (iv) 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).

5.9 Forms of Relief Commonly Obtained

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.

5.10 Claims Proceeding to Completed Litigation as Opposed to Dismissal or Settlement

There are no figures available for the settlement quota for competition law matters. As a general proposition, settlement is rather common in Switzerland, with, eg, overall approx. 65% of cases being settled at the Commercial Court of Zürich.

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5.11 Compensating Successful Attorneys

Attorneys for successful claimants are compensated in that the court obliges the losing defendant(s) to compensate 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.

5.12 Obligation for the Unsuccessful Claimants to Pay Defence Costs and/or Attorneys' 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.

5.13 Forms of Judicial Review or Appeal Available from 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 Governmental Authorities Publishing Written Guides

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: https://www.weko.admin.ch/weko/en/home/documentation/communications.html