

Cartels

Enforcement, Appeals & Damages Actions

First Edition

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Published by Global Legal Group

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Overview of the law and enforcement regime relating to cartels

Brief overview of the law relating to cartels

The Federal Act of 6 October 1995 on Cartels and Other Restraints of Competition (hereafter referred to as “Cartel Act”) is the legislation governing cartels in Switzerland. The regulatory framework is completed by several federal ordinances, notices and communications of the Competition Commission (“Comco”). The Cartel Act is construed independently from EU competition law (judgment of the Federal Supreme Court of 11 April 2011, joint cases 2C_343/2012 and 2C_344/2010, pt 4.3). Therefore, the legislation and individual solutions diverge from EU case law and the EU Commission’s decision-making practice.

The purpose of the Cartel Act is to prevent the harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy. The objective is not limited to economic aspects: general interest considerations are also taken into account. The law grants the Comco the power to assess the economic consequences of restrictions of competition and concentrations between undertakings, and leaves it to the Swiss Federal Council (the Swiss government) to assess the balance with the general public interest. Upon request by the undertakings, agreements and unilateral behaviour by dominant undertakings that have been declared unlawful by the Comco may be authorised by the Federal Council if, in exceptional cases, they are necessary for compelling public interest reasons.

The Cartel Act prohibits unlawful restraints of competition such as anti-competitive agreements or concerted practice. Anti-competitive agreements are defined as binding or non-binding agreements and concerted practices between undertakings operating at the same or at different levels of production which have a restraint of competition as their object or effect (Art. 4 § 1 Cartel Act).

The Cartel Act is based on the principle of abuse. The mere existence of an anti-competitive agreement does not, in itself, mean that the agreement is unlawful. To be unlawful, such an agreement must either eliminate effective competition or significantly impede effective competition without being justified on economic grounds.

In accordance with Art. 5 § 3 and 4 of the Cartel Act, the following horizontal and vertical restraints are presumed to eliminate effective competition and are thus considered as hard core agreements: horizontal agreements that directly or indirectly fix prices, restrict quantities of goods or services to be produced, purchased or supplied, or allocate markets geographically or according to trading partners, as well as vertical agreements that set minimum or fixed prices.

Authorities and enforcement regime

The authorities enforcing the Cartel Act are the Comco and its Secretariat. Based in Berne, the Comco consists of 12 members and is headed by a president and two vice-presidents. The majority of the Comco’s members must be independent experts with no interest in or special relationship with any economic group whatsoever. The Comco takes decisions, remedial actions and sanctions against undertakings.

The Secretariat is empowered to conduct investigations and, together with a member of the Comco,

to issue any necessary procedural rulings. The Secretariat submits draft decisions to the Comco and implements the latter's decisions. The total staff of the Secretariat amounts to more than 60 employees, a significant part of whom are economists. The Secretariat has major investigative powers; in particular it may order and seize any evidence, or hear third parties as witnesses and require the parties to an investigation to give evidence. The company under investigation is obliged to provide the competition authorities with all the information required for their investigations and produce the necessary documents.

Sanctions

Pursuant to Art. 49a of the Cartel Act, direct sanctions are imposed on undertakings that participate in a hard-core cartel or vertical restraints within the meaning of Art. 5 § 3 and 4 of the Cartel Act. An undertaking condemned for unlawful agreement risks fines up to 10% of the turnover that it achieved in Switzerland in the preceding three financial years. The amount of the fine is dependent on the duration and severity of the unlawful behaviour and is calculated also by taking into account the likely profit that resulted from the unlawful behaviour. If the undertaking assists in the discovery and in the elimination of the restraint of competition, the fine may be waived in whole or in part. The Cartel Act Sanctions Ordinance (hereafter referred to as "CASO") lays down the method of calculation of the fines.

Furthermore, an undertaking that violates to its own advantage an amicable settlement, a legally enforceable decision of the Comco, or a judgement of the Federal Administrative Tribunal or the Federal Supreme Court, can be fined up to three times the profit generated from such non-compliance. If such profit cannot be calculated or estimated, the amount may not exceed 10% of the undertaking's most recent annual turnover in Switzerland.

Finally an undertaking that fails to provide information or produce documents, or that only partially complies with its obligation during an on-going investigation can be fined up to CHF 100,000.

The Comco has large decision-making and remedial powers. It can issue injunctions to terminate a conduct or to change and modify certain business practice.

Overview of cartel enforcement activity during the last 12 months

Dawn raids

The Comco is not willing to reveal the exact number of dawn raids carried out by the Secretariat in the last twelve months. However, the practice of the Secretariat shows that, since the entry into force, in 2004, of an amendment to the Cartel Act allowing the authorities to conduct dawn raids, the Secretariat frequently made use of the new dawn raids provision in relation to cartel enforcement. For instance, at the end of 2011, the Secretariat opened an investigation for price fixing and market allocation in the sector of sanitary wholesale and performed dawn raids in the premises of five sanitary wholesalers, carrying out for the first time several employee interrogations on the spot. On 1 November 2012, the Comco announced the opening of a new investigation in the sector of road construction that was preceded by different dawn raids.

Ongoing investigations

Pursuant to the Comco, around ten cartel investigations are believed to be ongoing at present (horizontal and vertical restraints to competition).

The preliminary investigation concerning the Swiss market for hearing devices, opened in January 2010 is still pending. It focuses on possible horizontal agreements at the levels of manufacturers and distributors (known as audiologists) as well as possible vertical agreements between hearing aid manufacturers and audiologists. This procedure is of public interest since the majority of hearing devices are paid by public social insurances in Switzerland. It is estimated that the yearly costs of hearing devices amount to CHF 200m and are largely paid by public social insurances.

The Comco's investigation concerning the international cartels on airfreight and freight forwarding is still pending. A draft decision is expected.

In autumn 2011, the Comco initiated investigations against Jura Elektroapparate (household and

electrical devices) and Care on Skin (cosmetics regarding alleged restrictions on parallel imports). In addition, the Comco is conducting various preliminary investigations regarding alleged restrictions of parallel imports of balcony glass, electronic devices, electric bikes, motor bikes, etc. As mentioned above, the Comco opened an investigation in December 2011 against ten wholesalers of sanitary goods and conducted dawn raids for price fixing and market allocation.

In February 2012 Comco opened investigations against banks (beside the two major Swiss banks UBS and Credit Suisse, ten foreign banks and other financial intermediaries are subject to this investigation led by the Secretariat). Specifically, collusion between derivative traders might have influenced the reference rates LIBOR and TIBOR. Furthermore, market conditions regarding derivative products based on these reference rates might have been manipulated too.

Final cartel decisions

Seven final cartel decisions were issued in the last 12 months by the Comco. The total amount of fines imposed on parties amounts to around CHF 175m for the last twelve months and the highest individual cartel fine imposed amounts to CHF 156m. The Comco's decisions are currently under appeal before the Federal Administrative Tribunal.

Horizontal agreements

In October 2011, the Comco ruled that the information exchange taking place within ASCOPA, the Swiss association for cosmetics and perfumes wholesalers, led to a higher price level and thus to an agreement on keeping prices generally high. Although the first draft decision of the Comco was imposing fines up to CHF 25m per undertaking, the Comco finally did not impose any sanctions as the exchange of information was not considered to be a hard-core agreement. The ASCOPA's decision thereby concludes an investigation that has been widely discussed in the Swiss competition community.

In its decision dated 16 December 2011, the Comco imposed fines amounting to CHF 3.5m on 17 parties for unlawful bid-rigging in around 100 cases from 2006 to 2009 in the sector of road construction. The imposed individual fines range from approximately CHF 5,000 to approximately CHF 1.5m and amount to a total of approximately CHF 4m. Six companies were granted a reduction of their sanction, whereas one undertaking obtained a full waiver of its sanction under the leniency programme. Some of the parties decided to lodge an appeal with the Federal Administrative Court against that decision.

In July 2012, the Comco has found that the utilisation of tariff recommendations for management fees in the Canton of Neuchatel infringed the Cartel Act. Whilst the decision of the Comco has not been published yet, we know for certain that the real estate professionals of USPI Neuchatel, the local section of the Swiss Association of Real Estate Agents, agreed to reach an amicable settlement with the Comco on the basis of which the Comco pronounced a reduced fine of CHF 35,000.

Within the telecommunications sector, one of the priorities of the Comco is the protection of the construction and expansion of the optical-fibre infrastructure in Switzerland. In 2011, a number of Swiss cities or cantons (the canton of Fribourg and the cities of Basel Berne, Zurich, Lucerne, St-Gallen and Geneva) and telecommunication service providers intended to enter into joint projects for the construction of an optical-fibre network and notified the latter to the Secretariat of the Comco. The notification aimed at obtaining certainty that the Comco would not consider these joint projects to be unlawful. In September 2011 and February 2012, the Secretariat completed its review of the joint project and stated that the agreements contained hard-core restrictions on competition (i.e. agreements fixing prices and allocating output quotas). The Secretariat did not prohibit the reviewed joint projects but, due to its conclusions, the notifying parties would risk fines if they were to implement their joint projects.

Vertical agreements

In November 2011, the Comco held that Nikon unlawfully impeded parallel imports into Switzerland and fined the company CHF 12.5m. According to the decision, Nikon's dealer contracts contained provisions that implicitly or explicitly prohibited parallel imports into Switzerland. The distribution

agreements with Nikon's resellers in the EEA contained an obligation for the resellers not to sell Nikon's products outside the EEA (to which Switzerland does not belong) and there was a contractual ban on imports in a Swiss wholesaler agreement. Nikon argued that the clauses banning exports in Nikon's distributorship agreements for the EEA were drafted in a general way, did not specifically refer to exports to Switzerland and were not applied in practice. However, Comco found evidence during its dawn raid that the provisions were applied in practice and considered them to be passive sales restrictions affecting competition in Switzerland. The ban on imports was qualified as a hard-core restriction. The decision is under appeal.

The highest individual cartel fine imposed during the last 12 months amounts to CHF 156m and was issued against BMW in May 2012 for impeding direct and parallel imports into Switzerland. This is the third largest fine ever imposed by the Comco and the highest fine ever imposed by the Comco for unlawful vertical agreements. A provision contained in the BMW Group's contracts with authorised dealers in the EEA prohibiting them from selling BMW and MINI vehicles to customers outside the EEA (to which Switzerland does not belong) was considered as unlawful by the Comco. The investigation had been opened in autumn 2010 after the Comco received various complaints by Swiss customers who had unsuccessfully tried to purchase a BMW or MINI vehicle from a dealer outside Switzerland. The decision is also of particular importance for the car industry, as it contains important guidance for the definition of the relevant markets and thus also for the calculation of the respective market shares. The decision is currently under appeal before the Federal Administrative Tribunal.

With its decision dated 16 July 2012, the Swiss section of the International Federation of the Phonographic Industry (IFPI Switzerland), one of the largest industry associations in the music industry, as well as Phononet AG, a platform for electronic data exchange in the Swiss entertainment industry, reached an amicable settlement with the Comco in the framework of an investigation launched for alleged restrictions to parallel imports. IFPI Switzerland and Phononet agreed upon a fine of an amount of respectively, CHF 3.5m and CHF 20,000. They also undertook not to restrict or impede parallel imports of sound and/or sound carriers in Switzerland.

In October 2012, the Comco imposed a penalty of CHF 470,000 on Altimum SA (formerly Roger Guenat SA) for price fixing in sporting mountain items. In its decision, the Comco found that the general importer Altimum SA had set minimum resale prices to consumers for items of mountain sports brand Petzl (headlamps, harnesses, helmets, ice axes, etc.) and thus prevented dealers in Switzerland from competing effectively on price. The survey showed that competition in Switzerland has been significantly affected since at least 2006 and until 2010. The sanction is based on the turnover by Roger Guenat SA markets affected by the restriction of competition. The investigation began in May 2010 with a dawn raid on the headquarters of Roger Guenat SA.

Concerning online trade, the Comco set a precedent regarding provisions banning online sales. In recognition of the increasing importance of internet distribution channels, the Comco confirmed on 11 July 2011 that a general prohibition of internet sales is not permitted (RPW/DPC, 2011/3, *Behinderung des Online-Handels*, p. 372ff). It further held that limitations of online sale are allowed under very restrictive conditions only. By and large, these conditions must be determined in accordance with the principles established in the EU Commission's guidelines on vertical restraints.

Key issues in relation to enforcement policy

Investigations under the Cartel Act are two-staged procedures consisting of a first stage preliminary investigation that may be followed by a second stage in-depth investigation. Nevertheless, the Comco may open an in-depth investigation even without going through a preliminary investigation. The Secretariat can initiate preliminary investigations either on its own initiative, at the request of certain undertakings concerned (for example, competitors) or based on information received from third parties (complaints). It is at the discretion of the Secretariat to open a preliminary investigation. If the Secretariat concludes that there are indications of significant impediment of effective competition, an investigation will be opened, provided a member of the Comco's presiding body consents. The Secretariat must open an investigation if asked to do so by the Comco or by the Department of Commerce of the Swiss government.

On 18 April 2012, the Comco published its 2011 annual report and announced that the optical-fibre sector and the failure to pass on exchange rate benefits will be its permanent priorities. The Comco is concerned by the failure of a high number of undertakings that are active on the Swiss market and which refuse to pass on foreign exchange benefits. The Comco has also announced that it will be particularly vigilant in its fight against any contractual provisions or measures aimed at foreclosing the Swiss market. In this regard, in February 2012, the Swiss federal government proposed to revise the Federal Act to support Comco's campaign against horizontal and vertical hard-core restrictions on competition. *Inter alia*, the revised Cartel Act will (i) ease Comco's burden of proof in cases of horizontal or vertical hard-core restrictions by abolishing the possibility to rebut the presumption of a significant restriction on competition, and (ii) improve compliance by reducing fines imposed on companies that have implemented effective competition compliance programmes.

As outlined above, one of the main activities of the Comco in the second half of 2011 and in 2012 concerned vertical agreements. Some of the Comco's decisions in this field, such as the Nikon and BMW cases, need to be examined with the background of the Swiss authorities' constant concern that undertakings could try to provide for an absolute territorial protection of the Swiss market in order to raise prices above the level of the neighbouring countries. This concern became even more virulent with the economic crises and the increase of the Swiss franc's value against the euro. Since summer 2011, during which the Swiss franc reached its highest level, the Comco repeatedly stated that any restriction of parallel imports and passive sales as well as any resale price maintenance will be held unlawful. The Comco has investigated a significant number of cases involving restrictions to parallel imports. Indeed, in the last few years, the Comco has been acting aggressively against any prevention or restriction of parallel and direct imports. Hence, since 2009, Comco has acted against the following companies:

- Gaba: CHF 4.8m fine for restricting parallel imports of Elmex toothpaste (November 2009);
- Nikon: CHF 12.5m fine for restricting parallel imports of cameras and lenses (November 2011);
- Electrolux/VZug: decision prohibiting clauses banning online sales of home appliances (July 2011);
- BMW: CHF 156m fine for restricting direct and parallel imports of cars (May 2012);
- IFPI Switzerland and Phononet AG: respectively CHF 3.5m and CHF 20,000 fine for restricting parallel imports of phonograms and/or videograms (July 2012); and
- Altimum SA: CHF 450,000 fine for restricting parallel imports of sport goods (October 2012).

Finally, as announced in its 2010 annual report, the Comco will also continue to focus on combating international cartels in the coming years.

Key issues in relation to investigation and decision-making procedures

In Switzerland, the issue of how decisions are reached is a subject of significant debate. As outlined above (see paragraph 1), the authorities enforcing the Cartel Act are the Comco and its Secretariat. Formally, the Secretariat is in charge of the investigations and the decision itself is not issued by the Secretariat, but by the Comco. Accordingly, the investigating and decision-making bodies are separate. However, the Comco is involved in various ways in the investigations. For instance, the Secretariat conducts the investigation, but the Comco has the power to hold hearings, a power it has made frequent use of in the recent past. Moreover, it is the Comco which decides on the opening of an in-depth investigation or on the conduct of dawn raids.

Concerns were also raised as regards institutional autonomy, especially since sanctions are available under Swiss law. Sanction under Swiss competition law is an administrative sanction but would probably be considered as criminal sanctions in the meaning of Art. 14 of the UN Covenant II and 6 ECHR. Hence, an investigation opened on the basis of a hard-core agreement within the meaning of Art. 5 § 3 and 4 and 7 of the Cartel Act should respect all the procedural rights contained in Art. 14 of the UN Covenant II and 6 ECHR on the right to a fair trial. Pursuant to Art. 6 § 1 ECHR, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In light of the case law of the ECHR and of the functioning of the Comco and the Secretariat, the Comco cannot be considered as an independent and impartial tribunal but shall be

qualified as an extra parliamentary commission that monitors the market and whose works influence the economy. An appeal on full merits must be available against Comco's decisions in order for the system established in the Cartel Act to safeguard and to respect the fundamental requirements of the right to fair trial. The Federal Administrative Court is an independent and impartial tribunal that is empowered to review Comco's decisions on appeal, on the facts and on the law. The control performed by the Federal Administrative Tribunal shall be considered as the counterweight to the unclear dichotomous system established by the Cartel Act. In this regard, it is worth mentioning that one of the important issues of the revision of the Cartel Act is the revision of the institutional structure of the Comco, as it was considered to be basic by international comparison (see hereunder the paragraph "Reform proposals").

As regards procedural rights during the preliminary and the in-depth investigations, they can be outlined as follows:

- The preliminary investigation is intended to determine whether a further investigation is necessary. The decision to open an investigation is not a formal decision and cannot be appealed. Therefore the Administrative Procedure Act does not apply during the preliminary investigation made by the Secretariat and the parties concerned have no procedural rights, that is to say no right to consult files or records and no right to be heard. By the same token, third parties have no right to demand that the Secretariat opens an investigation.
- After the preliminary investigation and provided that there are sufficient elements, the Secretariat must, by means of an official publication, announce the opening of an in-depth investigation. Such an announcement must state the purpose of the investigation and the names of the parties involved. Furthermore, affected third parties have the possibility to join the investigation, albeit with limited procedural rights, upon a corresponding request made within 30 days of the announcement. All parties to the investigation are vested with the usual procedural rights contained in the Administrative Procedure Act provided, unless the Cartel Act stipulates otherwise (Art. 30 Cartel Act). They may consult files and suggest witness statements, and have the right to be heard and to participate in hearings. On the basis of this investigation, the Secretariat drafts and brings forward a motion for a decision. The parties and participating third parties may comment on the motion. If important new facts emerge, another round of hearings and witness statements may take place.

Neither the Comco nor the civil courts are required to undertake an investigation and reach a final decision within a specified period of time. There are no statutory time limitations applying to investigations. As an indication, a preliminary investigation can take from one to several months and a formal investigation nine months to two years or more. However, an appeal can always be lodged in case of undue delay in a civil or in an administrative procedure (Art. 319 of the Federal Civil Procedure Code ("CPC") and Art. 46a of the Administrative Procedure Act).

Pursuant to Art. 42 § 2 of the Cartel Act, the president or one of the vice-presidents of the Comco is enabled to order inspections and seizures upon request of the Secretariat. The Federal Act on Criminal Administrative Law applies by analogy to such proceedings. The Secretariat also published a notice on its procedure during inspections. Undertakings subject to an inspection have the right to be assisted by external lawyers who will, however, not be considered as contact persons. Only the CEO or the most senior representative will be considered as a contact person. The representatives of the Secretariat in charge of the inspection will not wait for the arrival of the external lawyers before starting to search the premises or seizing documents and electronic data. Any evidence discovered while external lawyers are not present will be separated. Once the external lawyers have arrived in the premises, the collected evidence may be screened by the lawyers who can comment on its content and, if necessary, ask for it to be sealed. All documents exchanged with lawyers, irrespective of the location where the documents are kept in custody, are legally privileged to the extent it concerns the professional representation of the party. If sealing of such documents is requested by reference to legal privilege, the Secretariat may nevertheless briefly review the respective documents. Advice from in-house counsel is not legally privileged.

Trade secrets such as know-how, a list of business clients, or financial accounting documents, are

specifically protected during the taking of evidence. The parties may request the non-disclosure of documents or censor trade secrets. However, should the Comco not consider some information as trade secrets, although the parties request their non-disclosure, the Comco can render a decision in this regard in order to force the undertaking to disclose the documents. The parties can be forced to waive legal privilege over these documents. The non-disclosure of documents covered by trade secrets can be an issue as regards the right to be heard of the other parties. Therefore, parties are sometimes requested to provide ranges concerning information covered by trade secrets, such as the turnover, number of sales, etc.

In the framework of a civil claim, pre-trial discovery is not available in Switzerland. During proceedings, a party can request from the court the issuance of documents which are in the possession of the counterparty or of a third party (Art. 160 § 1 lit. b, CPC). However this possibility may be of limited use since it presupposes an adequately substantiated description of the documents by the claimant. Furthermore, it is worth mentioning that third parties – and to a limited extent also the counterparty – can refuse the issuance of documents to the court, provided that they have the right to refuse to provide such information (Art. 163, 165 and 166 CPC).

There is a right to appeal against a procedural decision (interim decision) before the final decision on infringement has been taken, should this be in the framework of an administrative procedure, or of a civil procedure.

Under Swiss law, there is no provision for procedural disputes to be dealt with by an independent officer akin to the Hearing Officer within the EU system.

Leniency/amnesty regime

Leniency is an important aspect of enforcement in Switzerland. However, cartels are also discovered in other ways, for example on the Comco's own initiative, and investigation or through third party complaints. As the leniency programme has been available since 1 April 2004, there are only a few final decisions dealing with the leniency programme. It is therefore rather difficult to assess courts' review and control of the application of the leniency policy. Furthermore, the Comco does not yet provide any statistics concerning the number of cartels prosecuted with or without a leniency applicant. The practice shows that around two thirds of the cartels are successfully prosecuted by the Comco without a leniency applicant. Concerning the obligations imposed on a leniency applicant (for instance to cooperate fully with the investigation), they are considered to be fair and proportionate.

The leniency programme applies to restrictive agreements that are prohibited and subject to fines because they contain hard-core clauses as well as a hard-core horizontal agreement within the meaning of Art 5 § 3 and 4 of the Cartel Act (Art. 49a § 2 Cartel Act).

Pursuant to the Ordinance on Sanctions, the Comco grants immunity from fines if an undertaking is the first to either (i) provide information enabling the Comco to open an in-depth investigation pursuant to Art. 27 of the Cartel Act and the Comco did not have, at the time of the filing of the leniency application, sufficient information to open preliminary or an in-depth investigation within the meaning of Art. 26 and 27 of the Cartel Act, or (ii) submit evidence enabling the Comco to prove a hard-core horizontal or vertical agreement, provided that no undertaking has already been granted conditional immunity from fines and that the Comco did not have, at the time of the filing of the leniency application, sufficient evidence to find an infringement of the Cartel Act in connection with the alleged hard-core horizontal or vertical agreements.

However, immunity from fines will not be granted if the undertaking (i) coerced any other undertaking to participate in the infringement and was instigator or leader of the cartel, (ii) does not voluntarily submit all information or evidence in its possession concerning the unlawful practice in question to the Comco, (iii) does not continuously cooperate with the Comco throughout the procedure without restrictions and without delay, and (iv) does not cease its participation in the infringement of competition voluntarily, or upon being ordered to do so by the Comco.

Pursuant to the Cartel Act, total immunity is limited to the "first in". Hence, going in second will not allow total exemption from a fine, but it may be an element of discharge in view of obtaining partial

immunity. A reduction of up to 50% is available, at any time in the procedure to an undertaking that does not qualify for full exemption and can be granted to several undertakings involved in the same activity. The Ordinance on Sanctions does not provide any sliding scale of leniency. However, the Comco recently stated that the reduction of a fine may be subject to a sliding scale (for example, the second applicant qualifies for a 30% to 50% reduction, the next applicant for a 20% to 30% reduction, and so on). Further, the amount of the fine can be reduced up to 80% if an undertaking provides information to the Comco about other hard-core restraints of competition within the meaning of Art. 5 § 3 and 4 of the Cartel Act, and such hard-core restraints of competition were unknown to the Comco at the time of the disclosure (Art. 8 § CASO) (leniency plus). This reduction is without prejudice to any possible full exemption or partial reduction of fines for the newly disclosed cartel.

The Cartel Act does not expressly regulate the possibility for the Comco to withdraw immunity or leniency after it has been granted in a final decision. However, general principles of administrative procedure law usually enable administrative authorities to withdraw or amend final decisions (including final decisions in relation to full immunity or leniency) under certain circumstances, for example if (i) additional circumstances are discovered that justify withdrawal or amendment and/or (ii) a final decision is unjustified. There is no specific case law concerning leniency withdrawal.

It is always important to approach the Secretariat at an early stage, especially as according to Art. 49 § 3 of the Cartel Act no fine will be imposed if the undertaking itself files the restraint of competition with the authority before it produces any effects. The timing of cooperation is one of the factors determining the amount of reduction. The Secretariat conducts a full review of leniency applications in chronological order of receipt (provided that they are valid) to determine precedence for full immunity. The Secretariat will confirm receipt of the notification and inform the applicant of the time of receipt. The leniency application will be viewed less favourably if the evidence was already provided by other undertakings.

While applying for leniency, one should take into account that leniency applicants are not protected from litigation based on an earlier infringement decision by the Comco (follow-on litigation). However, the Comco is under no express legal duty to cooperate and provide judicial assistance to civil courts. It may thus refuse to grant access to documents produced by, and detrimental to, leniency applicants. To date, the Comco has not disclosed documents submitted by leniency applicants to civil courts. The protection of leniency applicants from follow-on private litigation is one of the objectives of the Comco, which justifies oral submissions by leniency applicants and restricts the right of access to files for the other members of the cartel (see Art. 9 § 1 of the CASO). This objective was clearly stated in a recent decision of the Comco, whereby it held that the other concerned parties to an investigation have the right to consult documents submitted by leniency applicants only at premises, and denied such concerned parties the right to make photocopies (RPW/DPC 2012/2, p. 215, *Wettbewerbsabreden im Strassen-und Tiefbau im Kanton Aargau*).

Administrative settlement of cases

Administrative settlement is a feature of the enforcement regime in Switzerland. During the preliminary investigation, the Secretariat may propose measures to eliminate or prevent restraints of competition (Art. 26 § 2 Cartel Act). In the framework of an in-depth investigation, if the Secretariat considers that a restraint of competition is unlawful, it may propose an amicable settlement to the undertakings involved concerning ways to eliminate the restraint for the future (Art. 29 § 1 Cartel Act). The amicable settlement shall be formulated in writing and approved by the Comco (Art. 29 § 2 Cartel Act). The Comco shall either approve or refuse an amicable settlement but is also entitled to amend the amicable settlement proposed by the Secretariat. However, the Comco has only once amended a proposed amicable settlement, namely by setting a time limit to the amicable settlement (RPW/DPC, 2006/1, *Kreditkarten/Interchange Fee*, p115). An amicable settlement is binding on the parties and the Comco and may give rise to administrative and criminal sanction in case of a breach of any of its provisions by the parties. By signing the amicable settlement, the undertakings renounce the right to appeal the final decision and thus accept the proposed fine.

Concerning infringements to competition leading to direct sanctions (Art. 5 § 3 and 4 and Art. 7 Cartel

Act), reaching an amicable settlement does not rule out fines in respect of infringements that took place before the amicable settlement's conclusion. Therefore, the Comco may approve an amicable settlement and at the same time impose sanctions. Such cooperative attitude from the undertakings can be considered as a mitigating factor (Art. 6 CASO). The practice of the Comco shows that a fine is in general reduced from 10% to 40%, depending also on other factors such as the duration of the illegal conduct or the cooperative attitude of the undertaking in the investigation. For more details concerning the calculation of fines and mitigating factors such as amicable settlements, see hereunder the "Civil penalties and sanctions" section.

The Secretariat will always try to reach an amicable settlement with the parties provided the conditions are met. The practice shows that amicable settlements are often concluded between the parties and the Comco. In the very recent cases IFPI Switzerland and Phononet AG, decision of 20 July 2012, and USPI, decision of 12 July 2012, the Comco approved the amicable agreements that were proposed by the Secretariat. Whilst the exact terms of the settlements have not been released, it is known that concerning *IFPI Switzerland and Phononet AG*, the parties have committed to (i) not require in the future the conclusion of a waiver for parallel imports of phonograms and/or videograms (e.g. CDs) from new members of IFPI Switzerland, and (ii) not retain or prevent such imports. Concerning USPI, the party has committed to withdraw its price recommendations for management fees and was therefore imposed with a reduced sanction of CHF 35,000.

Third party complaints

Third parties have two ways of complaining about suspected cartel arrangements.

The first way is a complaint to the Secretariat (Art. 26 Cartel Act). It is of the sole discretion of the Secretariat whether to open a preliminary investigation and third parties have no right to demand that the Secretariat open an investigation. The decision to open a preliminary investigation or not is not a formal decision and it cannot be appealed. If the Secretariat does open a preliminary investigation, third parties do not have any rights to consult files. If, after examining a complaint, the Secretariat decides not to pursue a complaint; it usually informs the parties about the reasons leading to such decisions. If the Secretariat concludes that there are indications of an unlawful restraint of competition, the Secretariat shall open an in-depth investigation in consultation with a member of the presiding body of the Comco and give notice by way of official publication (Art. 27 and 28 of the Cartel Act). This publication invites third parties to come forward within 30 days if they wish to participate in the investigation. Third parties that announce themselves acquire the status of parties in the procedure and therefore have access to the file.

It must be noted that the numbers of third parties' complaints lodged by the Comco significantly increased in 2011. In the context of the significant appreciation of the Swiss franc against the US dollar and the euro in Summer 2011, consumer protection associations launched a vigorous campaign claiming that only small part of manufacturers' currency gains were passed on to Swiss and accusing Comco of not cracking down on such practices. The Comco reacted by publicly calling on Swiss consumers to file complaints with Comco if they suspected that a manufacturer restricted parallel imports in order to protect its currency gains. Supported by a media campaign and a number of political proposals, Comco's public call resulted in 270 complaints being filed with Comco from mid-July 2011 to the beginning of October 2011, while in earlier years a total number of 300 complaints would have been filed in an entire year. However Comco reminded the public that the Cartel Act does not prevent manufacturers or importers from keeping currency gains for themselves and that Comco can act only against unlawful agreements pursuant to Art. 4 and 5 of the Cartel Act. Furthermore, the Secretariat formed a task force of four staff members who were to examine and process the complaints.

The second way for a third party affected by a cartel is to sue in front of a civil court for damages. Under Art. 12 of the Cartel Act, any person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request from the courts:

- the elimination of, or desistance from the hindrance;
- damages and satisfaction in accordance with the Code of Obligations; or
- the surrender of unlawfully earned profits in accordance with the provisions on agency without

authority. Hindrances of competition include, in particular, the refusal to deal and discriminatory measures.

Claims against competition restrictions can also be found in Art. 28 of the Swiss Civil Code (hereafter referred to as “CC”). Art. 28 CC protects personality rights, including economic rights. The applicant may ask the court to prohibit a threatened infringement, to order that an existing infringement cease, or to make a declaration that an infringement is unlawful if it continues to have an offensive effect.

Besides the Cartel Act, the Swiss Federal Law against Unfair Competition (“the Unfair Competition Act”) is also pertinent for private antitrust actions. According to Art. 9 of the Unfair Competition Act, whoever suffers or is likely to suffer prejudice to his clientele, his credit or his professional reputation, his business, or his economic interests in general through an act of unfair competition may request the courts:

- to prohibit an imminent prejudice;
- to remove an ongoing prejudice; or
- to establish the unlawful nature of a prejudice if the consequences still subsist. He may, further, institute proceedings for damages and redress and may also require the surrender of profits in accordance with the provisions on agency without authority.

The actions should be brought before the higher civil cantonal courts. As was the case in the past, the new CPC, in force as of 1 January 2011, requires cantons to designate one court having sole cantonal jurisdiction for disputes related to the Cartel Act and to the Unfair Competition Act. The ‘single cantonal court’ has exclusive jurisdiction to order interim measures. The parties are exempted from filing an ordinary prior compulsory conciliation procedure. Concurrently with the Cartel and Unfair Competition Acts, the plaintiff may base its claim on other legislation and present it before the single cantonal court. The respondent may, however, only bring counterclaims falling under the jurisdiction of the same single cantonal court.

Civil penalties and sanctions

From a civil point of view, the sanction for cartel activities lies in the total or partial nullity of the agreement in question. Although generally accepted in the actual doctrine, it has not yet been confirmed that the nullity of the agreements applies *ex tunc*.

From an administrative point of view, any undertaking participating in an unlawful agreement pursuant to Art. 5 § 3 and 4 and 7 of the Cartel Act may be charged up to 10% of the turnover generated within Switzerland in the preceding three financial years (Art. 49a § 1 of the Cartel Act). This sanction is an administrative sanction but would probably be considered as criminal sanctions in the meaning of Art. 14 of the UNO Pact II and 6 ECHR (RPW/DPC 2010, p. 265, *Swisscom-Mobilterminierung*).

Pursuant to Art. 5 § 3 and 4 of the Cartel Act, the law provides for a rebuttable presumption that certain hard-core restrictions eliminate effective competition. In this regard, it remains unclear to what extent the Comco could impose an administrative fine to an undertaking participating in an unlawful hard-core agreement within the meaning of Art. 5 § 3 and 4 of the Cartel Act but which would have succeeded in reversing the presumption that hard-core restrictions eliminate effective competition. Concerning sanctions for abuse of a dominant position, the Federal Administrative Tribunal, referring to Art. 7 ECHR, distinguishes between practices falling within the list of Art. 7 § 2 Cartel Act and those covered by the general clause of Art. 7 § 1 Cartel Act: only the former are liable to be sanctioned with a fine, because the general clause does not offer sufficient legal certainty to undertakings. The pertinence of this distinction is not yet confirmed by the Federal Supreme Court, but it is expected that the Comco will base its decisions on one of the examples of Art. 7 § 2 Cartel Act.

The amount of the fine depends on the duration and severity of the unlawful conduct. The company's turnover is calculated by analogy with the rules on the calculation of turnover in mergers (Art. 4 and 5 of the Merger Control Ordinance, hereafter referred to as “MCO”) and encompasses the consolidated turnover. The base amount is up to 10% of the consolidated turnover generated on the relevant markets in Switzerland in the previous three business years, depending on the type and severity of the infraction (Art. 3 CASO). The “normal” profit that resulted from the unlawful behaviour is taken into

account in the base amount. The relevant market includes product market and geographical market. The product market comprises all products and services that potential partners of the exchange regard as substitutable because of their characteristics and the purpose for which they are intended; geographic market comprises the area in which potential partners of the exchange are engaged in both supply or demand side for products and services in the product market. The explanation above regarding the calculation of the turnover by analogy with the rules on the calculation of turnover in mergers is applicable. In recent price fixing cases, the Comco applied a percentage between 5% and 7% for the base amount. The base amount will be increased by up to 50% if the agreement was operational for up to 5 years. Each additional year will lead to an increase of another 10%. In practice, the Comco increased the base amount by 10% for each year of duration.

This amount may increase by a certain percentage reflecting aggravating factors, such as recidivism, high cartel gains, obstruction of justice, ring leader and measures to enforce cartel discipline (Art. 5 CASO). The law is not exhaustive and others factors could be taken into account. In particular, Swiss law does not fix the percentage of each aggravating factor but gives the Comco room to decide, depending on the circumstances of each particular situation. Practice has shown that the Comco does not retain aggravating factors in every case. In the recent case of bid-rigging in the road construction sector in Aargau, where aggravating factors were taken into account, the increase sometimes went up to 200% in connection with the number of infringements in case of tenders where competitors were coordinating their prices (RPW/DPC 2012/2, p. 215, *Wettbewerbsabreden im Strassen- und Tiefbau im Kanton Aargau*).

The amount may decrease by a certain percentage reflecting mitigating factors. Examples of mitigating factors are: immediate termination of the illicit behaviour after Comco has taken first steps; passive role in the cartel; or desisting from taking cartel enforcement measures. The percentage of aggravation of each factor is not set by the law (Art. 6 CASO). In certain exceptional cases, Comco may take into account as a mitigating factor that no profit was obtained from the unlawful conduct. The Comco does not always retain mitigating factors. In recent cases the percentages varied from 10% to 60% depending on whether the companies fully collaborated, immediately ceased their unlawful practices or concluded an amicable agreement with the Comco. Reaching an amicable settlement can also be considered as a mitigating factor (Art. 6 CASO). However, the Comco takes very much into account the moment of the amicable settlement. In a case of late settlement, the Comco only reduced the sanction by 3% (RPW/DPC 2010, p. 765, *Fensterbeschläge*), and announced that it will not reduce fines if the amicable settlement is signed after the second draft decision of the Secretariat. Concerning leniency, which will also be taken into account for the calculation of the fine, see the paragraph hereinabove, “leniency and amnesty regime”.

The undertaking usually liable for the payment of the fine is the receiver of the decision. In a group of companies, should the subsidiary not be considered as an undertaking within the meaning of the Cartel Act and should the subsidiary be effectively controlled by the parent company, it is the parent company that will be considered liable for the payment of the imposed fine. In the very recent BMW decision, the Comco reaffirmed this point by imposing the total fine on the parent company BMW AG in Germany and not BMW Switzerland.

Right of appeal against civil liability and penalties

Decisions of the Comco and, to a limited extent, also interim procedural decisions, can be appealed to the Federal Administrative Tribunal. An appeal can be lodged on the following grounds: (i) wrongful application of the Cartel Act; (ii) the facts established by the Comco were incomplete or wrong; or (iii) the Comco’s decision was unreasonable (this claim is rarely invoked in practice). Hence, the appeal before the Federal Administrative Tribunal is a “full merits” appeal on both the findings of fact and law.

The addressees of the decision have the right to appeal, whereas it is uncertain to what extent competitors, suppliers or customers have the same right. The decisive factor is whether third parties are affected by the Comco’s decision. Usually this is true if a third party is significantly affected in its market activity by the anti-competitive agreement. But the courts apply this criterion restrictively.

For example, in a very recent case, the Federal Administrative Tribunal had to examine whether third parties – undertakings which had first lodged a complaint before the Comco – were significantly affected by a decision of the Comco following which it denied any abuse of a dominant position by two different companies in the market of events-ticketing (judgment of the Federal Administrative Tribunal dated 19 September 2012, pt 3.9). The Federal Administrative Tribunal considered that the third parties were not significantly affected in their market activities, as neither the position on the market of two companies nor the agreement concluded between them caused a substantial disadvantage that could have significantly affected their market activities.

The Federal Administrative Tribunal can produce evidences such as hearing witnesses or seeking expert reports. However, the case law shows that this was very rarely done, as the appeal file is usually very well documented, and the Federal Administrative Tribunal tends to render its judgments on that basis.

Concerning the effective judicial control carried out by the Federal Administrative Tribunal, one must say that it remains currently difficult to properly assess or to analyse its work as the Federal Administrative Tribunal took office in January 2007. For the moment, the Federal Administrative Tribunal always carried out the complex economic analyses thoroughly. Therefore its judicial control regarding competition law cases seems effective. The Federal Administrative Tribunal does not hesitate to overturn decisions of the Comco.

Currently, most of the judges of the Federal Administrative Tribunal do not have specific and in-depth qualifications on competition law. However, the establishment of qualified judges in competition law is one of the objectives of the current revision of the Cartel Act (see hereunder under “reform proposal”).

As already said, the Administrative Federal Tribunal has always thoroughly examined the appeals it dealt with. There is also an effective judicial control of the imposition of fines and their calculation. The largest fine ever issued for abuse of dominant position by the Comco – CHF 333m – was cancelled by the Federal Administrative Tribunal in January 2010. The fine on Publigroupe of CHF 2.5m for refusal to deal and discriminatory practices was confirmed by the Federal Administrative Tribunal in February 2010 (RPW/DPC 2010/2, p329, *Publigroupe*) and by the Federal Supreme Court on 29 June 2012 (the judgment has not been published yet).

The judgments of the Federal Administrative Tribunal may be challenged before the Federal Supreme Court. In proceedings before the Federal Supreme Court, one may not claim that the judgment of the Federal Administrative Tribunal is unreasonable, and claiming the fact-finding of the inferior instances to be incomplete or wrong is only permissible to a very limited extent. In principle, the Federal Supreme Court can only review the application of the Cartel Act.

In addition, the parties involved may, at any time, during and after appeal procedures request the Federal Council (Swiss government) to authorise agreements and unilateral behaviour by dominant undertakings that have been declared unlawful by the Comco if, in exceptional cases, they are necessary for compelling public interest reasons (Art. 8 Cartel Act).

The judgments of civil courts may ultimately be challenged before the Federal Supreme Court. The above-mentioned developments regarding the request for exceptional authorisation to the Federal Council apply *mutatis mutandis*. If the legality of a restraint of competition is disputed before a civil court, the case must be referred to the Comco for an expert report. The Comco’s opinion is not binding to the civil judge.

Criminal sanctions

There are no criminal sanctions for cartel activities but only administrative sanctions (see “civil penalties and sanctions” section).

However, anyone who wilfully violates an amicable settlement, a final and non-appealable ruling of the competition authorities or a decision of an appellate body is liable for a fine not exceeding CHF 100,000 (Art. 54 Cartel Act). Anyone who wilfully does not, or does not fully comply with a ruling of the competition authorities concerning the obligation to provide information, who implements

a concentration that should have been notified without filing a notification, or who violates rulings relating to concentrations of undertakings, is liable to a fine not exceeding CHF 20,000.

If the same matter is prohibited by the Swiss Criminal Code (e.g., destruction of a competitor's plant), aggrieved parties may raise a civil claim for damages within the framework of the criminal procedure or separately, based on Art. 41 of the Swiss Code of Obligations. In principle, the judge in charge of the criminal procedure also rules on civil claims, except where the damage was not clearly determined in the request or the damage calculation requires substantial efforts. The judgment of a criminal court as to the guilt and to the determination of the damage, and the provisions of the criminal law concerning criminal responsibility, are not binding upon a civil judge.

Cross-border issues

The Cartel Act applies to all concerted practices and agreements that have a direct, substantial and reasonably foreseeable effect within Switzerland (Art. 2 § 2 of the Cartel Act). Therefore, agreements concluded abroad or conduct that takes place outside Switzerland, but has such effects in Switzerland, may fall under Swiss jurisdiction. In May 2012, the Comco imposed a fine of CHF 156m to BMW AG, the parent company with registered offices in Germany, for restriction to parallel and direct imports as the contracts with its authorised distributors in the EEA were prohibiting them from selling to customers outside the EEA. These unlawful provisions had an economic effect in Switzerland. Therefore, it is important for undertakings whose activities produce effects in Switzerland to be fully aware of the potential implications of Swiss competition law rules for their agreements and practices.

Other than the Free Trade Agreement of 1972 between the EU and Switzerland (Art. 23 and 28) and the OECD Guidelines of 1995, there are no bilateral agreements in place between the Comco and foreign competition authorities. However on an informal basis, the Comco and its Secretariat cooperate with various antitrust authorities in Europe, specifically the EU Commission and the German Bundeskartellamt, as well as with the US antitrust authorities. This cooperation does not go beyond the exchange of non-confidential information unless the parties to the proceeding have explicitly consented to an exchange of confidential information.

The Cartel Act provides for a specific regime with regard to investigations in the air transportation industry. Accordingly, the Comco may cooperate with the EU Commission on a formal legal basis.

Investigations, prosecutions and sanctions decided by antitrust authorities abroad have no binding effect on the Comco. Even if the EU regulatory framework and case law have often made significant inroads into Comco's practice, the Federal Supreme Court explicitly held that Swiss competition law must be interpreted independently from EU law.

As already mentioned, to date Switzerland has not entered into any bilateral or multilateral agreements on the exchange of confidential information or any other kind of cooperation with competition law authorities of other jurisdictions. As regards exchange of information with foreign authorities, the Comco has, for years, already pointed out that in light of its involvement in the investigation of international cartels, it would be very helpful to have the possibility of an information exchange with the EU Commission and other competition authorities. Hence, without cooperation and exchange of information, the Comco is often left to wait for a decision of the EU Commission in parallel cases in order to ascertain the extent of its jurisdiction and the conduct to be investigated, which is why investigations against international cartels often take longer in Switzerland than in the EU. Therefore, in March 2011, Switzerland and the EU started negotiating an agreement on cooperation and exchange of information between their competition authorities. After a second round of negotiations during the summer of 2011, the EU Commission published on 1 June 2012 its proposal on the conclusion of an agreement between the EU and Switzerland concerning cooperation on the application of their competition laws (COM(2012) 245 final). Before entering into force, the cooperation agreement needs to be adopted by the EU Council and the EU Parliament and approved by the Federal Parliament. Under Swiss law, such an agreement could also be the object of a public referendum. The core element of the cooperation agreement is the intended exchange of specific, case-related information between the Swiss and EU competition authorities. The cooperation agreement will have far-reaching consequences once concluded. A major change to the present status is the transmission of

information and documents between the authorities even if the concerned company does not consent to the transmission, without a right to appeal and even outside an in-depth investigation. However, information submitted before the Comco under a leniency application may not be transferred without the consent of the applicant. The cooperation agreement will, in particular, have to be taken into account in the preparation of a dawn raid situation and in the assessment of multi-jurisdictional leniency applications (i.e. whether or not to include Switzerland).

Developments in private enforcement of antitrust laws

In Switzerland, the third party private enforcement level is currently relatively low as regards follow-on claims as well as stand-alone claims. The most relevant reason is the difficulty to gather evidence and the high costs related thereto. In comparison, lodging a complaint before the Comco leads to a free administrative procedure. Another factor is that, according to the prevailing doctrine, final consumers are not authorised to bring claims based on the Cartel Act. However any consumer would have legal standing to bring a claim for damages under tort law. Finally, the short period of the statute of limitations for a claim for damages is an additional reason which explains this low level. Indeed, the limitation period for a claim for damages or reparations expires one year after the claimant is aware of both the complete damage and the identity of the injuring party, but in any case at the latest ten years after the restraint of competition has ended (Art. 60 of the Swiss Code of Obligations). The same rules apply regarding the claim for remittance of illicitly earned profits. Regarding the two last issues, the draft bill concerning the revision of the Cartel Act foresees the recognition of legal standing to final consumers and the suspension of the statute of limitations during an investigation of an alleged anticompetitive practice by the Comco. Should these two provisions be adopted, this could have an impact on private enforcement.

The legal standing of consumers associations as regards private enforcement actions based on the Cartel Act remains unclear. Trade or consumer organisations possess legal standing provided they are undertakings under the Cartel Act (which means that they exercise a commercial activity) and are hindered in the process of competition. The issue of their standing to protect members' interests, as was the case under the former Cartel Act of 1962, however, remains disputed. In principal, the legal literature tends to recognise trade or consumer organisations' active legal standing with regard to actions for injunctions to terminate a restriction of competition, but not with regard to actions for damages incurred by their members. The new CPC recognises active standing to associations and other organisations of national and regional importance to bring an action in their own name against violations of the personality rights under Art. 28 CC of their members. Personality rights also include in principle economic rights and thus, at least in theory, trade or consumer organisations may claim for the prohibition of an existing or threatened violation of personality rights (for instance, prohibition of a boycott or a refusal to deal). Furthermore, it is currently not possible for a representative body to bring a collective follow-on claim in Switzerland on behalf of consumers. These are additional factors which make private enforcement unattractive in Switzerland.

Concerning the gathering of evidence, pre-trial discovery is not available in Switzerland. Furthermore, an exchange of information between the Comco and the civil courts does not take place in general. It is therefore difficult to obtain any documents before the start of the proceedings. However, one should note that potential claimants are often in a position to gain access to the file of the Comco by requesting to be treated as a party in the administrative procedure. In practice the Comco is generous in granting party status. As a party in the administrative procedure, the damaged party has access to the entire file. The damaged party can then use copies from the file to support its civil claim. This may result in a considerable facilitation of proof for civil competition actions in cases where an administrative procedure is pending or has already been terminated (follow-on actions). A potential claimant might be inclined to initiate an administrative proceeding first by filing a request with the Comco. Important information may, however, qualify as trade business and remain inaccessible.

Interim remedies are available under Swiss law (Art. 261 to 269 CPC). Interim remedies focus on avoiding or terminating the restraint of competition. All appropriate and reversible measures for such interim execution are available (Art. 262 CPC), e.g. the interim obligation to enter into a contract or

to grant admission to a trade fair. However, the interim payment of a sum of money is not possible and therefore, interim awards of damages are not available in Switzerland.

The Cantonal Court of Vaud recently rendered an interesting decision in ordering a European sport federation to invite an athlete to one of its competitions as a recommendation issued by the sport federation, a Swiss domiciled association, not to invite athletes who could harm the events because of their doping offences from the past, was considered as infringing rules on abuse of dominant position (Art. 7 Cartel Act) and injuring athletes' personality rights (judgment of 24 June 2011, published in CaS 2011, 282).

Reform proposals

There are currently several revision projects under discussion. On 22 February 2012, the Swiss Federal Council submitted to the Federal Parliament a draft bill aimed at substantially amending the Cartel Act. Among other goals, the proposed legislation aims to force manufacturers and importers to pass on currency gains. Several of the proposed amendments are highly controversial. The draft bill is currently being examined by the relevant commissions of the Federal Parliament and has already triggered fierce discussions. The relevant parliamentary commission has already asked the Federal government to further examine some particular points of the draft bill. It is therefore currently very unclear to predict if and when the proposed amendments could enter into force. The most relevant suggested amendments concerning cartels are the following:

- The draft bill foresees a number of institutional changes in order to reinforce the institutional autonomy of the Swiss competition authorities. Currently, a semi-professional authority (Comco) is in charge of all decisions under the Cartel Act. The Comco bases its decisions on the investigations of its Secretariat. Since 2004, when the direct sanctions provisions entered into force, concerns have been raised about the independence and professionalism of the Comco as well as the adequacy of its procedures. Therefore, the Federal Council proposes that the actual Secretariat of the Comco would be transformed into a new independent Competition Authority in charge of the investigations, not of the decisions in antitrust cases, except in merger cases, where the Competition Authority would not only conduct investigations but also take decisions. Furthermore, the Competition Authority would no longer include any representatives of industry and trade associations and unions. The actual Comco would become a new chamber of the Federal Administrative Tribunal and would take decisions upon a motion of the Competition Authority in antitrust cases. It would further act as a lower appellate court in merger cases. As opposed to the present situation, the Federal Administrative Tribunal would include judges with entrepreneurial experience or specific knowledge of competition economics. The Federal Supreme Court would act as the only appellate court in antitrust cases and as the upper appellate court for merger cases. It is expected that the proposed new institutional setup would clearly distinguish between the investigative and decision-making tasks and hence improve both the quality and the acceptance of decisions in competition matters. Furthermore, procedures would become more efficient and faster due to the limitation of appeals. The relevant parliamentary commission has however raised concerns about this proposal and is therefore asking the Federal Government to examine the possibility of keeping the current system by improving the rights of the parties and enhancing the independence of the Comco. The parliamentary commission will then compare both solutions.
- Under the current law, all horizontal and vertical hard-core restrictions that cannot be justified on grounds of economic efficiency are prohibited. The government proposal does not change that prohibition, however it suggests that this prohibition be of a *per se* character for hard-core restrictions (see paragraph 1 *supra*), unless they can be justified on grounds of economic efficiency. Under the new regime, the Competition Authority would no longer be required to prove a significant adverse effect on competition for the hard-core restrictions. The draft bill seems to move the burden of proof for the efficiency defence to the undertakings. However, the relevant parliamentary commission is not satisfied with these points of the draft bill and has asked the Federal Council to prepare a new version.

- The bill also provides for a potential reduction of fines imposed on undertakings if the undertaking shows that it implemented an effective competition compliance programme.
- Moreover, if an undertaking submits notification of a restraint to competition before it takes place, the bill stipulates that no sanction can be imposed on the undertaking if an investigation procedure is not opened by the competition authorities within two months of the notification.
- Finally, the following provisions of the bill, concerning private antitrust actions, could have an impact on cartels: (i) the recognition of legal standing to final consumers; and (ii) the suspension of the statute of limitations for civil actions during an investigation of an alleged anticompetitive practice by competition authorities.

In addition to the above-mentioned amendments, the Federal Parliament will also have to deal with two proposals from its own ranks. The first proposal is to prohibit illegal price differentiations (i.e. companies selling branded products abroad for lower prices than in Switzerland). The relevant parliamentary commission proposes to reject this motion. The second proposal concerns the introduction of criminal sanctions against individuals accountable for breaches of the Cartel Act. Even though the Federal Council raised various concerns about this proposal, and refrained from including it into its draft bill, the relevant parliamentary commission is of the opinion that such a provision should be included in the Cartel Act.



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