The Cartels and Leniency Review

Second Edition

Editor
Christine A Varney

Law Business Research

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EDITOR'S PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcement. Some notable cartels managed to remain intact for as long as a decade before they were uncovered. Some may never see the light of day. However, for those cartels that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than two dozen jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part due to US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors of these chapters are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations, and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with chapters on 31 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the second edition of *The Cartels and Leniency Review*. We hope that you will find it a useful resource. The views expressed in this book are those of the authors and not those of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

Christine A Varney
Cravath, Swaine & Moore LLP
New York
January 2014

Chapter 28

SWITZERLAND

Nicolas Birkhäuser[1]

I ENFORCEMENT POLICIES AND GUIDANCE

The Swiss Cartel Act (the CartA) applies to practices that have an effect on competition in Switzerland, even if they originate in another country. Pursuant to Article 49a of the CartA, only certain practices[2] may lead to sanctions in the case of a first-time infringement (i.e., without violation of a prior order by, or settlement with, the Competition Commission (the ComCo)[3]). Agreements (including hard-core restrictions) that do not significantly affect competition are lawful according to Article 5, Paragraph 1 of the CartA and not subject to first-time infringement sanctions.

However, the ComCo persistently holds that agreements without any quantitatively significant effect are unlawful, basically arguing that a mere qualitatively significant effect is sufficient to assume a significant effect on competition. In consequence, the ComCo aims to introduce a *per se* prohibition of hard-core restrictions. The introduction of a *per se* prohibition of hard-core restrictions is also the object of a partial revision of the CartA, which is currently being debated in Parliament (see also Section VIII, *infra*). Several decisions of the ComCo, *inter alia*, concerning this issue of the requirement of a significant effect on competition, have been appealed and are pending before the Swiss Federal Administrative Court, whose decisions will ultimately be subject to appeal to the Swiss Federal Supreme Court (both courts together: the courts). Another debated issue in this context is whether horizontal and vertical agreements can only be sanctioned if they

1 Nicolas Birkhäuser is a partner at Niederer Kraft & Frey Ltd.

2 Hard-core horizontal and vertical agreements presumed to eliminate competition according to Article 5, Paragraphs 3 and 4 of the CartA, and abuse of dominant position according to Article 7 of the CartA.

3 If not further specified, this definition includes the Swiss Competition Commission and its Secretariat.

eliminate competition pursuant to the statutory presumption of Article 5, Paragraphs 3 and 4 of the CartA or if they can also be sanctioned if they merely significantly affect competition pursuant to Article 5, Paragraph 1 of the CartA; this question is also the object of pending appeals before the courts.

For the past couple of years, one of the main focuses of the ComCo has been to investigate restrictions on parallel imports from the European Economic Area (the EEA), or even from places such as the United States or Hong Kong into Switzerland (note that under Swiss law, the exhaustion of IP rights is worldwide, except for patents where it is regional and limited to Switzerland and the EEA; however, also in cases of the regional exhaustion of patents, the principles of competition law may prevail). The main geographic focus of the ComCo with regard to parallel imports is the EEA. However, there have been cases with a wider geographic scope, and a further case concerning the US may be expected. This has partly been a reaction to the currency appreciation of the Swiss franc, in particular in relation to the US dollar, the euro and the British pound, and the subsequent considerable political pressure on the ComCo. The ComCo has already issued a number of decisions imposing sanctions on undertakings (in particular, GABA, Nikon, BMW and the market for books in French), which it considers to be leading cases establishing practice against the alleged prevention of parallel imports and the foreclosure of the Swiss market (appeals are pending against all these decisions). The ComCo has repeatedly stated that it is determined to proceed vigorously against the foreclosure of the Swiss market and to establish a policy to discourage such practices. Besides, the ComCo has traditionally focused on hard-core horizontal agreements (cartels). One area of particular interest is cartels in the building and construction industry. In September 2012, the ComCo established a new department responsible for the fields construction, procurement and environment. A considerable number of investigations in the field of the building and construction industry has been opened.

In a recent decision regarding the market for books in French published in September 2013, the ComCo has, for the first time, imposed sanctions based on intra-group facts. Two of several parties to the investigation were group companies of French publishing houses or suppliers. Certain agreements between these parent companies and daughter companies (i.e., intra-group agreements) allegedly had as their object that measures should also be taken outside the group against parallel imports into Switzerland. The ComCo decided that such intra-group agreements went beyond intra-group relations and, therefore, were not covered by the intra-group exemption. This is a new practice, which opens a new field to be reviewed and monitored by the undertakings.

Apart from the CartA, (in particular) the Cartel Act Sanctions Ordinance (the CASO), explanations by the ComCo regarding the CASO, and a few notices regarding vertical restraints, the procedure at dawn raids and the treatment of business secrets (all available on the website of the ComCo), provide guidance that reflects the point of view of the ComCo.

II COOPERATION WITH OTHER JURISDICTIONS

Even though this still applies only to a minority of cases, the ComCo is increasingly investigating issues that are the object of multi-jurisdictional investigations. This is partly

the result of leniency applications being made in Switzerland by undertakings that are party to multi-jurisdictional investigations.

At the time of writing, however, a coordination of investigation proceedings of the ComCo with proceedings of other competition authorities is not possible because it has no legal means to exchange case-specific information and documents with other competition authorities. There are currently no agreements in force on mutual administrative assistance between Switzerland and other countries with two exceptions:

a the bilateral air services agreement between Switzerland and the EU, which stipulates that the contracting parties must provide each other with all necessary information and assistance required in connection with investigations of alleged infringements of this particular agreement (Article 19 of the agreement – however, the scope of this provision is unclear); and

b the bilateral trade agreement between Switzerland and Japan, which stipulates that the competition authorities of each contracting party must cooperate with and assist the other competition authority in connection with enforcement activities (Article 11 et seq. of the implementation agreement).

If an undertaking has, in particular, affiliates, subsidiaries or assets in Switzerland, the ComCo may try to take legal action against these in Switzerland or apply pressure for them to cooperate. Even then, however, it is questionable whether an affiliate or subsidiary not directly involved in the actions subject to the investigation by the ComCo could be forced to produce information and documents belonging or related to another group company outside Switzerland (not being a subsidiary or under the control of such Swiss entity); there are good arguments that this cannot be the case, but this has, seemingly, not yet been tested in the courts (see also the final paragraph of Section III, *infra*).

A cooperation agreement on competition has been signed between Switzerland and the EU. The ComCo and the European Commission are convinced that many anti-competitive practices have cross-border effects on the Swiss and EU markets, and that closer cooperation between the authorities will bring great benefits to both sides. The cooperation agreement is a second-generation agreement and covers, in particular, the exchange of evidence and information obtained by the competition authorities during their investigations.

Practitioners question whether the benefits will be balanced in favour of Switzerland. Furthermore, in particular, the limited defence rights of the undertakings under investigation are widely criticised. However, leading political opinion seems to approve of the conclusion of the cooperation agreement. The agreement has yet to be approved by the Swiss and European Parliaments; however, given that the initiative came from the EU but that the ComCo strongly approves of the cooperation agreement, it should be expected that the agreement will be approved in both Switzerland and the EU. It is currently expected that it might enter into force around mid-2014.

According to statements by representatives of ComCo, it may be assumed that the cooperation agreement will not become applicable with regard to information and documents produced to the competition authorities prior to its entering into force. However, it is as yet unclear whether it may also become applicable, from its entry into force, in then-ongoing proceedings with regard to information and documents produced after its entering into force.

This cooperation agreement should now be taken into consideration when determining a strategy with regard to any proceedings in Switzerland and in the EU. As a result, undertakings involved in proceedings in Switzerland will have to assess potential implications (at least) also in the EU, and vice versa.

It is possible to submit leniency applications orally to the ComCo, the aim being that leniency applicants can cooperate with the ComCo without being subject to discovery with regard to such submissions. Due to a lack of precedents, however, it is not clear whether a potential plaintiff in a private enforcement claim may (directly or through the civil courts) successfully claim access to the file, including the corporate leniency statement. In addition, a potential plaintiff may request a civil court to order that the leniency applicant itself produces the relevant evidence concerning the leniency application under its control. Proceedings regarding claims for access to the file are currently pending before the ComCo and the Swiss Federal Administrative Court. No final decisions have yet been taken, and it remains to be seen how the ComCo and the courts will decide. However, at the time of writing, according to informal information received from representatives of the ComCo with regard to ongoing proceedings, it seems that the ComCo might take a rather restrictive approach with regard to requests for access to the file by third parties that are not parties to the proceeding in order to protect the leniency applicants, ultimately in the interest of the leniency regime. Even then, it will remain to be seen how the courts will decide in the issue.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Pursuant to Article 2, Paragraph 2, the CartA applies to practices that have an effect in Switzerland, even if they originate in another country. It is not relevant whether an undertaking has a physical presence in Switzerland. An effect in Switzerland is normally assumed when, *inter alia*, products and services (that are affected by practices) are sold, distributed, etc., to counterparties in Switzerland, or when the sale, distribution, etc., of products and services in or into Switzerland is restricted (e.g., as in the case of a restriction on parallel imports). According to the practice of the ComCo and the prevailing doctrine, the threshold of the effects in Switzerland relevant for the applicability of the CartA is low. Once the CartA is held to be applicable, the effects are further assessed under the substantive law provisions of Articles 5 and 7 to determine whether agreements and practices do significantly affect competition in Switzerland and are, as a consequence, unlawful.

A different question is whether enforcement of a sanction based on the CartA against an undertaking domiciled outside Switzerland is possible. Direct enforcement outside Switzerland against an undertaking domiciled outside Switzerland is widely held not to be possible (however, this has not yet been tested). Enforcement in Switzerland against undertakings domiciled outside Switzerland would, as a rule, be possible to the extent that these undertakings have assets in Switzerland that could be seized (e.g., funds held in a bank account located in Switzerland, real estate, moveables, deliveries, claims, stocks that have not been issued or that are held in Switzerland). It is unclear whether Swiss group companies of sanctioned undertakings domiciled outside Switzerland

could be made (jointly) liable for sanctions against these undertakings, in which case enforcement could be directed at these Swiss group companies in Switzerland. The practice of the ComCo concerning liability of group companies within a group of companies is inconsistent. At least in cases where the Swiss group company is a subsidiary of a parent company domiciled outside Switzerland (and, thus, does not have any means to influence), liability of such group company would likely have to be denied if it was not involved in the relevant action (however, this has also not yet been tested in court). Under Swiss law, branch companies are qualified as being a part of the headquarters (i.e., the branch company, including its assets, belong to the headquarter and, as a consequence, constitute assets of the headquarters). Thus, enforcement would as a rule be possible in Switzerland at the place of the respective branch company if the headquarters is held to be liable.

Another question is whether the ComCo has the legal means to force undertakings domiciled outside Switzerland to comply with information requests and to provide information and documents. The ComCo currently has, with few exceptions, no legal means of exchanging case-specific information and documents with other competition authorities (see also Section II, *supra*) and to legally force undertakings domiciled outside Switzerland to produce information and documents. In a recent interim order, however, the ComCo ordered that an undertaking domiciled outside Switzerland provide information in response to an information request. The ComCo took the view that the foreign undertaking is subject to the obligation to provide information according to Article 40 CartA, and that the fact that this could violate foreign law did not alter such obligation. The Swiss Federal Administrative Court confirmed in an interim order the lifting of the suspensive effect by the ComCo, but has, to our knowledge, not decided on the merits yet. However, it seems that the question of whether the ComCo has the means to enforce the obligation to provide information abroad is not the object of the proceeding. In the past, the ComCo has furthermore addressed information requests regarding foreign undertakings to their Swiss subsidiaries. It is unclear whether the fact that the Swiss entity does not possess the requested information or that the requested information (exclusively) concerns foreign group companies would be considered to be a valid defence for the Swiss entity not to comply with such an information request. While it does seem to defy common logic to request a company to provide information it does not have, this has, seemingly, not yet been tested in the courts.

IV LENIENCY PROGRAMMES

Due to the current practice of the ComCo, it is often very difficult – if not impossible – for undertakings to apply for leniency and, at the same time, to properly defend their positions. According to the current practice of the ComCo, while a leniency application does not have to contain an assessment of the (substantial) legal situation, at least the participation in an agreement according to Article 4, Paragraph 1 of the CartA must be notified and admitted. According to the ComCo, an undertaking making a leniency application must furthermore be deemed to be in principle capable of judging whether and how the agreement has affected the market (i.e., it must also admit its effects on the market). As a result, the ComCo takes the view that it is not possible for undertakings to

make a leniency application with the reservation (caveat) of not having participated in an agreement that had an effect on the market (i.e., in a restriction on competition). Even though to admit having participated in an agreement according to Article 4, Paragraph 1 of the CartA does not necessarily mean that such agreement is unlawful according to Article 5, Paragraph 3 or 4 of the CartA, such confession may, depending on the agreement in question, strongly prejudice the legal position particularly, because the effects on the market must also be admitted.

Under this practice of the ComCo, a leniency application can be very risky. Undertakings must also be aware that third parties, whether or not they are parties to the proceedings before the ComCo, may be granted access to the file, and that the publications of the ComCo may be very detailed and disclose facts directly taken from the leniency applications (proceedings are ongoing and pending with regard to these issues; see also the final paragraph of Section II, *supra*). In multi-jurisdictional cases, undertakings may well also have to coordinate a leniency application in Switzerland with leniency applications submitted in other jurisdictions, and vice versa (see also Section II, *supra*).

Therefore, prior to applying for leniency, undertakings should carefully analyse what the advantages and disadvantages of a leniency application are in each particular case. In short, the advantage of full or partial immunity or of a discount of the sanction must be weighed against the disadvantage of the risks of self-incrimination with regard to the proceeding before the ComCo (particularly where an undertaking is not the first or at least second leniency applicant) or with regard to private enforcement claims that may well use confessions made and statements, information and facts produced within a leniency application as decisive evidence for their purposes. There are further criteria to consider, such as reputational implications.

Under the current practice of the ComCo it may, depending on the case in question, be preferable not to apply for leniency and to fully defend oneself. The decision can be difficult and must be taken quickly. Given the current practice of the ComCo, if an undertaking is seriously concerned about the disadvantages of a leniency application, it may rather refrain from applying for leniency and limit itself to cooperation with the ComCo outside a leniency application. This will avoid making confessions and will allow the undertaking to defend itself without limitation.

Pursuant to Article 49a, Paragraph 2 of the CartA, a sanction may be waived in whole or in part if the undertaking assists in the discovery and elimination of the restraint of competition.

According to Article 8 of the CASO, the ComCo may grant an undertaking complete immunity from a sanction if the undertaking reports its own participation in a restriction on competition according to Article 5, Paragraph 3 or 4 of the CartA (hard-core horizontal and vertical agreements) and if it is the first applicant to provide information that enables the ComCo to open competition law proceedings or evidence that enables the ComCo to establish an infringement of competition (subject to the information or evidence not already being available). Immunity from sanctions is granted only if several conditions are met, such as that the undertaking:

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

b voluntarily submits to the ComCo all available information and evidence;

c continuously, completely and expeditiously cooperates throughout the procedure; and

d ceases its participation in the infringement of competition upon submitting its leniency application.

Although the CASO stipulates a full or partial waiver of fines only in cases of horizontal and vertical agreements according to the CartA, it may be assumed, based on the wording of Article 49a, that a waiver is also possible in cases of unlawful practices by dominant undertakings under Article 7, provided, however, that the aforementioned conditions are fulfilled.

If an undertaking submits a leniency application as the second or subsequent applicant and voluntarily cooperates in proceedings, and if it terminates its participation in the infringement of competition no later than at the time at which it submits evidence, the ComCo may, according to Article 12, Paragraphs 1 and 2 of the CASO, reduce the sanction by up to 50 per cent of the sanction. The importance of the undertaking's contribution to the success of the proceedings is decisive in calculating the amount of the reduction. The reduction in the case of the third and any further leniency applications may, according to the actual practice of the ComCo, amount to between 5 per cent and 25 per cent, and also more under certain circumstances.

Under the leniency plus regime, according to Article 12, Paragraph 3 of the CASO, the reduction may amount to up to 80 per cent of the sanction if an undertaking voluntarily provides information or submits evidence on further infringements of competition according to Article 5, Paragraph 3 or 4 of the CartA (hard-core horizontal and vertical agreements).

The conclusion of a settlement with the ComCo normally leads to a reduction of sanctions; this is possible both in cases where a leniency application is or is not made. In the case of settlements outside a leniency application, the ComCo may apply a reduction of approximately 3 per cent (if late), or 10 per cent, 20 per cent or 25 per cent (if early). In the case of settlements with the ComCo within a leniency application not as the first or second leniency applicant, a discount in the range of 10 per cent to 25 per cent might be expected (if early and satisfactory from the point of view of the ComCo).

Furthermore, cooperation outside a leniency application (i.e., where no leniency application is made) that goes further than that demanded by the ComCo can also lead to a reduction of the sanction. Even though the explanations by the ComCo regarding the CASO (provided on the website of the ComCo) state that cooperation is only taken into consideration within a leniency application, part of the doctrine takes a different view, and the ComCo has adopted such other view at least in certain cases. Mere cooperation would likely be rewarded with a smaller discount than the conclusion of a settlement with the ComCo, and it is uncertain how cooperation would be rewarded if a subsequent settlement offer of the ComCo is declined by the cooperating undertaking (e.g., which can be done for valid reasons).

It must be noted that there is no established practice by the ComCo with regard to discounts, which is why the above amounts must be seen only as a tentative indication. The amounts of the reduction in cases of settlement or cooperation depend on the facts (e.g., on the timing and the importance of the undertaking's contribution).

With regard to the form and content of the leniency application, the undertaking must submit to the ComCo all necessary information on the undertaking seeking leniency, the type and nature of the reported infringement of competition, the undertakings participating in the infringement of competition, a description of the affected or relevant markets, and an indication of the evidence that supports the application (this is according to the leniency application form provided on the website of the ComCo referring to Articles 9 and 13 of the CASO).

A leniency application can only be filed individually, not jointly by two or more undertakings.[4] Leniency applications should be submitted by fax, by hand or orally for the record.[5] The reason indicated for this by the ComCo is that it could be difficult to determine the exact order of receipt of leniency applications sent by post. Applications sent by e-mail or made by telephone are not considered as having been validly filed.

The ComCo confirms in writing the receipt of the leniency application, indicating the time of receipt, and sets a marker that fixes the priority for the review of the different leniency applications. The marker sets the priority of the leniency application of an undertaking even though the undertaking may have to produce further documents within due course. Undertakings may have an interest in first knowing what their chances are of obtaining complete immunity from a sanction. For that purpose, they may submit their leniency application by filing the information anonymously (mainly through a lawyer). By confirming receipt of the application, the ComCo will advise the undertaking of the deadline by which it must disclose its identity.

There is hardly any risk of ethical issues arising from simultaneous representation by a counsel of the corporate entity and its employees who may face liability as far as sanctions are at issue. Only undertakings can be sanctioned administratively for first-time infringements according to Article 49a of the CartA, whereas natural persons, such as employees, who are subject to criminal sanctions, cannot be sanctioned for first-time infringements, but only for violations of settlements, administrative orders and certain other infringements; leniency will, therefore, have no effect on natural persons. The situation is, however, different in particular with regard to criminal liability (in Switzerland and, more likely, in foreign jurisdictions), claims for damages (that would, however, at least in Switzerland likely not be directed against employees, but rather against the undertakings) and sanctions against employees by the employer, including the loss of the employment.

V PENALTIES

In Switzerland, sanctions are at present mainly administrative. Only undertakings can be sanctioned for first-time infringements against the substantive law provisions of Article 5, Paragraphs 3 and 4 or Article 7 of the CartA (hard-core horizontal and vertical

4 Article 8, Paragraph 1 of the CASO.

5 The leniency application must be filed with the Secretariat of the Swiss Competition Commission, Monbijoustrasse 43, 3003 Berne, Switzerland, Fax: +41 31 322 20 53.

agreements, and abuse of dominant position).[6] Natural persons, such as employees, who are subject to criminal sanctions, cannot be sanctioned for first-time infringements against these provisions, but only for infringement of settlements and administrative orders and certain other infringements, which are subject to fines of up to 100,000 Swiss francs.[7] The sanctions that are of interest in connection with the leniency programme are the administrative sanctions under Article 49a of the CartA for first-time infringements of the aforementioned substantive law provisions; these sanctions can only be imposed on undertakings.

Pursuant to Article 49a, Paragraph 1 of the CartA, any undertaking that participates in an unlawful horizontal or vertical agreement pursuant to Article 5, Paragraphs 3 and 4 of the CartA or that abuses a dominant position pursuant to Article 7 of the CartA will be sanctioned with a fine of up to 10 per cent of the turnover achieved in Switzerland in the preceding three financial years (cumulatively); this is not limited to the relevant markets. Only these types of restrictions on competition can be sanctioned in the case of first-time infringements (i.e., without violation of a prior order by, or settlement with, the ComCo).

Article 3 of the CASO provides that, depending on the seriousness and nature of the infringement, the basic amount of the sanction (starting from which the sanction is calculated) may amount to a maximum of 10 per cent of the turnover achieved by the undertaking in the relevant markets in Switzerland during the preceding three business years. In cases of horizontal agreements, the basic sanction usually amounts to 7 per cent to 10 per cent, and in cases of vertical agreements, usually to 5 per cent; however, the practice has developed and may further develop.

Starting from the basic amount of the sanction, various factors are relevant for the determination of the sanction, some of which are aggravating and some of which are mitigating:

a Article 4 of the CASO provides that if the infringement of competition has lasted for one to five years, the basic amount shall be increased by up to 50 per cent. If the infringement has lasted longer than five years, the basic amount may be increased by an additional 10 per cent for each additional year.

b According to Article 5 of the CASO, if there are aggravating circumstances, the amount of the sanction is increased, in particular if the undertaking has repeatedly infringed the CartA, has, due to the infringement, achieved a profit that is particularly high by objective standards, or has refused to cooperate with the ComCo or attempted to obstruct the investigations in any other manner. In the case of restrictions on competition according to Article 5, Paragraphs 3 and 4 of the CartA (horizontal and vertical agreements), the amount of the sanction may be further increased if the undertaking played an instigating or leading role in the restraint of competition, or instructed or carried out retaliatory measures against other undertakings participating in the restriction on competition in order to enforce the agreement affecting competition.

6 Articles 49a to 52 of the CartA; not all administrative sanctions under these provisions are for first-time infringements.

7 Articles 54 to 55 of the CartA.

c According to Article 6 of the CASO, if there are mitigating circumstances, in particular if the undertaking terminates the restriction on competition after the first intervention of the ComCo but at the latest before proceedings are opened (the exact time is disputed), the amount of the sanction may be reduced. In the case of restrictions on competition according to Article 5, Paragraphs 3 and 4 of the CartA (horizontal and vertical agreements), the amount of the sanction may be reduced if the undertaking played a strictly passive role in the restriction on competition, and did not carry out retaliatory measures that had been agreed in order to enforce the agreement affecting competition.

The list of mitigating circumstance according to Article 6 of the CASO is not exhaustive. In particular, cooperation outside a leniency application and the conclusion of a settlement with the ComCo may also lead to a reduction of a sanction.

See Section IV, *supra*, with regard to the full and partial waiver of a sanction in the case of leniency applications, as well as with regard to discounts in the case of the conclusion of settlements and in the case of cooperation with the ComCo.

VI 'DAY ONE' RESPONSE

A government cartel investigation is often an unpleasant surprise. A swift, effective and well-coordinated response is essential.

As further outlined in Section IV, *supra*, a leniency application can be very risky due to the current practice of the ComCo. Therefore, prior to applying for leniency, undertakings should carefully analyse what the advantages and disadvantages of a leniency application are in each particular case. As mentioned, in short, the advantage of full or partial immunity or of a discount of the sanction must be weighed against the disadvantage of the risks of self-incrimination with regard to the proceedings before the ComCo and the courts, and with regard to private enforcement claims. Under the current practice of the ComCo, it may well be preferable not to apply for leniency and to instead fully defend oneself.

If an undertaking is seriously concerned about the disadvantages of a leniency application, it should perhaps refrain from applying for leniency and limit itself to cooperation with the ComCo outside a leniency application. Such cooperation that goes further than that demanded by the ComCo can also lead to a reduction of the sanction. Such cooperation would in particular include answering questions of the ComCo (in reply to information requests) and voluntarily providing documents and information concerning the facts that are the object of the investigation. The more continuous, complete and expeditious cooperation is, the more likely and substantial a discount of the sanction will, as a rule, be.

The ComCo has the power to search any premises, including business premises, private addresses and the areas surrounding them. The ComCo is usually accompanied by an official, the police and IT experts, and may seize any evidence. The undertakings and their employees are obliged to provide the ComCo with the documents that the ComCo requests and to grant access to everything. Questions of the ComCo that are related to the dawn raid must be answered (e.g., regarding the location of documents,

the archive system or passwords). Furthermore, the ComCo can interrogate employees of the undertaking under investigation who may qualify as organs of the undertaking, and that as such have the status of the accused, or who may qualify as simple witnesses with limited defence rights and more extensive obligations to answer questions. The ComCo has started interrogating employees in parallel to the dawn raid, which is widely criticised by the doctrine and practitioners because it curtails the defence rights of the undertaking under investigation, in particular because there is no time to prepare the defence and because key personnel may be absorbed in the critical phase of 'day one'. There is no obligation to actively assist the ComCo with the dawn raid.

The undertaking should appoint a dawn raid team responsible for the coordination and supervision of any dawn raids on the side of the undertaking. Such tasks will include:

a studying the search warrant and assessing the scope of the dawn raid;

b providing the ComCo with a working room;

c determining one – or, better, two – employees for each ComCo representative to accompany and take note of their every action and every question;

d ensuring that only documents that are covered by the search warrant are searched;

e providing sufficient copying capacities;

f making two copies of any seized materials (one copy to keep so that the undertaking has an exact copy of what is seized by the ComCo);

g attempting to ensure that copies are seized instead of originals or that scans are made (which is usually possible if there are sufficient copying capacities);

h communicating with employees and the outside world, to keep such communication under control; and

i making sure that materials are sealed if there is any disagreement on whether they may be seized (a revision of the applicable Swiss Code of Administrative Penalty Procedures has entered into force, according to which attorney–client correspondence is not only protected at the premises of the attorney, but also at the premises of the client; legal privilege).

The dawn raid team should act as the point of contact to the ComCo. Undertakings should always be prepared for dawn raids in advance.

VII PRIVATE ENFORCEMENT

Private antitrust enforcement has not yet played a significant role in Switzerland. There have been only few cases, one of which was in the area of the road-building industry, where the agreements were far-reaching insofar as they covered all market participants and all transactions, and as the amounts were relatively high. Private enforcement claims were brought forward and ended up in a settlement. It remains to be seen whether private enforcement will also be used in less obvious cases where the argument and the gathering of evidence will be more difficult.

Notwithstanding this hesitant development in Switzerland, there are specific provisions in the CartA regarding private enforcement. Pursuant to Article 12 of the CartA, a person hindered by an unlawful restriction on competition from entering or competing in a market is entitled to request the elimination of, or desistance from,

the restriction or damages in accordance with the Code of Obligations, and surrender of unlawfully earned profits in accordance with the provisions on agency without authority.

Pursuant to Article 41 of the Code of Obligations, a person claiming damages must prove that loss or damage occurred. The level of proof to claim damages is high in Switzerland; basically, any damages must be established based on the specific facts. Where the exact value of the loss or damage cannot be quantified, the civil court may estimate the value at its discretion in the light of the normal course of events and the steps taken by the injured party. There are no punitive damages in Switzerland. It remains to be seen what the practice of the civil courts will be with regard to private antitrust enforcement claims.

Leniency granted to an undertaking does not preclude the undertaking being subject to private enforcement.

VIII CURRENT DEVELOPMENTS

A revision of the CartA has been proposed and is currently being debated, which includes the following elements:

a The institutions shall be revised to include an independent competition authority competent for investigating potential infringements and for reviewing proposed concentrations (mergers), and a new chamber of the Swiss Federal Administrative Court competent for deciding on matters brought before it by the (new) competition authority. The aim of such new institutions will be to have more independence between the investigating and the decision-making bodies, and generally to have a more independent decision-making body. However, this part of the revision is, according to the current status of the debate, likely not to be adopted.

b Article 5 will be revised to introduce basically a *per se* prohibition of the five types of agreements falling under Article 5, Paragraphs 3 and 4 of the CartA (hard-core horizontal and vertical agreements). This would basically be achieved by abolishing the condition of a significant effect on competition for a restriction on competition to be unlawful.

c A motion is pending and being debated according to which a new provision will be introduced into the CartA – a new Article 7a – so that undertakings distributing their products outside Switzerland in an OECD country at lower prices than in Switzerland will be deemed as infringing the CartA if they refuse to supply customers from Switzerland through their foreign distribution entities at the same prices and conditions, or if they take measures to prevent third parties from supplying into Switzerland. The ComCo itself opposes the introduction of this new provision mainly because it anticipates problems with regard to enforcement. However, one chamber of the Parliament surprisingly approved the introduction of this new provision. The final debate remains open.

d The criteria for the assessment of concentrations (mergers) will be amended by introducing the SIEC test (significant impediment to efficient competition), which is commonly applied in the EU.

e Compliance programmes of undertakings shall lead to a reduction of sanctions.

The outcome of the revision is currently unknown.

As previously mentioned, in a recent decision regarding the market for books in French published in September 2013, the ComCo for the first time imposed sanctions based on intra-group facts (see Section I, *supra*).

As also previously mentioned, a cooperation agreement on competition has been signed between Switzerland and the EU (see Section I, *supra*).

As further mentioned, a revision of the Swiss Code of Administrative Penalty Procedures has entered into force, according to which attorney–client correspondence is not only protected at the premises of the attorney, but also at the premises of the client (legal privilege).

It is debated whether it should be possible to make a leniency application without admitting participation in a restriction on competition; in particular, whether (at least) the participation in an agreement according to Article 4, Paragraph 1 of the CartA, must be notified and admitted, and, furthermore, whether an undertaking making a leniency application must be deemed capable of judging whether and how the agreement has affected the market; the current practice of the ComCo is that this must be admitted. Such confessions can strongly prejudice the outcome of investigations and can be very harmful with regard to private enforcement claims.

Furthermore, the practice of the ComCo, according to which third parties are granted access to the file, is not yet established, but is rather being developed. It remains to be seen how these debated issues will further develop.

Finally, and according to recent informal information, the ComCo intends to revise its practice regarding the conclusion of settlements by issuing summary decisions, with the aim that these cannot form the basis of claims in private enforcement proceedings. This will make settlements (which allow the ComCo to conduct proceedings much more efficiently and with fewer resources) more attractive to the undertakings under investigation. However, the ComCo intends to make this dependent on certain conditions, such as in particular that all parties to an investigation join the settlement and that the parties decide quickly to join the settlement.

Appendix 1

ABOUT THE AUTHORS

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Nicolas Birkhäuser is a partner in Niederer Kraft & Frey Ltd's competition law practice group. He graduated from the universities of Basel (*lic iur*, 1998) and Cambridge, UK (LLM, 2003).

Mr Birkhäuser advises and represents clients in competition law matters concerning in particular merger control, compliance, market dominance and, with a particular emphasis, cartel enforcement investigations, including dawn raids and the risks and opportunities of leniency programmes. One of the central themes of Mr Birkhäuser's advice is to provide solutions that create a maximum of freedom of action for the undertakings in each specific case.

Mr Birkhäuser represents undertakings under investigation in cases of alleged breaches of competition law and coordinates with the multi-jurisdictional defence strategies and responses. His aim is to achieve the best results in both the proceedings before competition authorities and courts as well as private litigation and other aspects of an undertaking's defence. Mr Birkhäuser advises from the very beginning of an investigation, by dawn raid or otherwise, through to the proceedings before competition authorities, including the assessment of potential leniency applications and the defence of the undertakings' interests, potential appeals before the courts, and with regard to potential private enforcement claims.

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