The Cartels and Leniency Review

Third Edition

Editor
Christine A Varney

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For further information please email
Nick.Barette@lbresearch.com

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Chapter 31

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 the wording of 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 was the object of a partial revision of the CartA, which has, however, been rejected 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 are subject to appeal to the Swiss Federal Supreme Court (both courts together: the courts). The Swiss Federal Administrative Court issued two decisions in January 2014 in the matters of *GABA* and *Gebro* establishing *per*

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.

se prohibitions in the case of hard-core restrictions according to Article 5 Paragraphs 3 and 4 of the CartA, i.e., basically stated that hard-core restrictions are restrictions by object without the requirement of a significant effect (impact) on competition, as stipulated in Article 5 of the CartA. Appeals against these decisions of the Swiss Federal Administrative Court are pending before the Swiss Federal Supreme Court (the ComCo has explicitly requested the Swiss Federal Supreme Court to decide the relevant issues regarding the application of Article 5 of the CartA; i.e., there may be a new leading case fairly soon). On the contrary, decisions of the Swiss Federal Administrative Court in September 2014 ruled that there is no such thing as a *per se* prohibition under Swiss competition law and that it must be established in every single case that competition has been significantly restricted by the agreement in question. The relationship between the earlier decisions and the latter decisions is not clear (the latter decisions do not refer to the previous decisions), and it is also not clear how the Swiss Federal Supreme Court will decide. Therefore, it cannot be foreseen with certainty what the practice of the courts and as a consequence of the ComCo, will be. Another debated issue in this context is whether horizontal and vertical agreements can only be sanctioned if they 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 (EEA), or even from places such as the United States or Hong Kong into Switzerland (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, the principles of competition law may also prevail in cases of the regional exhaustion of patents). This has partly been a reaction to the appreciation of the Swiss franc, in particular in relation to the US dollar, the euro and the British pound, following the financial crisis, and a consequence of the perception of Switzerland as an island of high prices, which led to considerable political pressure on the ComCo. The ComCo has already issued a number of decisions imposing sanctions on undertakings (in particular, *GABA/Gebro*, *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; as mentioned above, the decisions in the matters of *GABA/Gebro* have been decided by the Swiss Federal Administrative Court and are now pending before the Swiss Federal Supreme Court). 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 construction, procurement and environment sectors. A considerable number of investigations in the building and construction industry have 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.

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

II COOPERATION WITH OTHER JURISDICTIONS

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.

A cooperation agreement on competition between Switzerland and the EU was enacted on 1 December 2014. 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 criticised. According to statements by representatives of the ComCo, it may be assumed that the cooperation agreement will not be applicable with regard to information and documents provided to the competition authorities before its entering into force. It is expected that it will be applied, from its entry into force, in then-ongoing proceedings with regard to information and documents produced after its entering into force. This cooperation agreement must be taken into consideration when determining a strategy with regard to any proceedings in Switzerland and the EU. As a result, undertakings involved in proceedings in Switzerland will also have to assess potential implications (at least) in the EU, and vice versa.

Apart from the mentioned cooperation agreement on competition between Switzerland and the EU, 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).

In summary, the ComCo's case-specific cooperation with other competition authorities will primarily consist of cooperation with the European Commission and be based on the cooperation agreement on competition between Switzerland and the EU. In addition, the ComCo has, in particular, certain means of notifying undertakings domiciled abroad and asking them to provide information and documents (see also the last three paragraphs of Section III, *infra*).

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, intellectual property rights, 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 headquarters 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. Apart from the cooperation agreement on competition between Switzerland and the EU, there are, with very limited exceptions, currently no agreements in force on mutual administrative assistance between Switzerland and other countries (see also Section II, *supra*). In an interim order, however, the ComCo ordered an undertaking domiciled outside Switzerland to 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 of the CartA, and that the fact that this could violate foreign law did not alter such obligation. Such decision was based on a balancing of interests, which is why, depending on the case at hand, the obligation to provide information and documents might possibly also be rejected.

Furthermore, the ComCo made requests to the French authorities to obtain information and documents, which it had requested from certain parties domiciled in France, based on the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Convention). The parties had previously declared themselves prepared to cooperate with the ComCo, but incapable of complying with the ComCo's information requests due to the French *loi de blocage*. The ComCo's request under the Hague Convention was approved by the French authorities in a decision in July 2014.

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. The ComCo ordered in a decision that a Swiss subsidiary of an undertaking domiciled abroad, which was a party to a proceeding and the addressee of information requests, must accept notification (service) of such information requests addressed to its parent company and provide the information requested from the parent company domiciled abroad irrespective of where the information was located. This decision of the ComCo was appealed to the Swiss Federal Administrative Court, which considered in the reasoning of its decision that notification of information requests to the Swiss subsidiary on behalf of its parent company domiciled abroad is lawful, but that the Swiss subsidiary cannot be required to provide information if the parent company has the exclusive power and responsibility to decide on the transmission of such information. However, this decision is not entirely clear, which is why there is uncertainty in this respect.

IV LENIENCY PROGRAMMES

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 confessed. 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 confess its effects on the market). According to the ComCo, typically no leniency application is made (i.e., the conditions of a leniency application are not fulfilled) if the undertaking itself invalidates the submitted information and evidence (e.g., by contesting a coordination (concerted practice) with other undertakings or by generally denying (possible) negative effects on competition). Even though a confession of 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, prejudice the legal position. The notification and assumption of an agreement according to Article 4, Paragraph 1 of the CartA necessarily includes a legal assessment of the facts of the case and a confession of relevant criteria. The reason for this is that Article 4, Paragraph 1 of the CartA does not only provide a definition of the term 'agreement' but also introduces several other terms, such as, among others, 'a restriction of competition as object or effect' or 'concerted practices', all of which require a (legal) subsumption of the facts.

The Swiss Federal Administrative Court rendered three decisions in September 2014, which seem to adopt an approach that is different from the ComCo's approach. The Swiss Federal Administrative Court stated, in particular, that a party's willingness to cooperate cannot be interpreted as a confession of guilt. Accordingly, filing a leniency application does not have any impact on a party's rights of defence. The Swiss Federal Administrative Court further stated that information or evidence provided with a leniency application only relates to the facts of a case and that the legal assessment of such facts is, in contrast, not part of the leniency application. It stated that, in any case, a leniency application does not prevent a party from holding a different legal opinion. Since the ComCo had argued that the party to the proceeding had withdrawn its leniency application by contesting the existence of an agreement in the sense of Article 4, Paragraph 1 of the CartA, the above findings of the Swiss Federal Administrative Court presumably mean that the existence of an agreement according to Article 4, Paragraph 1 of the CartA must not be confessed in a leniency application and that it can be contested. The ComCo appealed two of the three decisions of the Swiss Federal Administrative Court (which do not treat all issues equally). There is no legal certainty with regard to the question of whether a leniency applicant must confess and may not contest an agreement pursuant to Article 4, Paragraph 1 of the CartA. Until the Swiss Federal Supreme Court has issued a final decision covering the relevant issues, the two different approaches of the Swiss Federal Administrative Court and the ComCo will remain contradictory. Both the Swiss Federal Administrative Court's decisions and the ComCo's practice cannot be considered as definitively determining the legal environment in which an undertaking would have to assess its case.

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 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 (with regard to access to the file see also the two last paragraphs of Section VII, *infra*). There are also further criteria to consider, such as reputational implications.

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 either (1) provide information enabling the ComCo to open an in-depth investigation according to Article 27 of the CartA and the ComCo did not have, at the time of the notification, sufficient information to open a preliminary or an in-depth investigation within the meaning of Articles 26 and 27 of the CartA, or (2) submit evidence enabling the ComCo to find 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 submission, sufficient evidence to find an infringement of Swiss competition law in connection with the alleged hard-core horizontal or vertical agreement. 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.

It is still unclear whether a waiver is also possible in cases of unlawful practices by dominant undertakings under Article 7 of the CartA (due to the aforementioned conditions, a reduction of 100 per cent would not be possible, but only a reduction of a maximum of 50 per cent). The leniency application form and communication issued in September 2014 does not state anything in this respect. According to representatives of the ComCo, the ComCo will decide on this in the near future and include a respective statement in an update of the leniency application form and communication.

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. The importance of the undertaking's contribution to the success of the proceedings is decisive in calculating the amount of the reduction.

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).

According to the current practice of the ComCo, the conclusion of a settlement with the ComCo normally leads to a reduction of the amount of the sanction of up to 20 per cent (if the settlement is concluded at an early stage of proceedings); this is possible both in cases where a leniency application is or is not made.

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 amount 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. According to the current practice of the ComCo, mere cooperation leads to a reduction of the amount of the sanction of up to a maximum of 20 per cent (if the cooperation is very good). However, it is uncertain how cooperation would be rewarded if a subsequent settlement offer of the ComCo were declined by the cooperating undertaking.

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 leniency application, 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, a description of the object and effects of the infringement of competition, and an indication of the evidence that supports the application (this is according to the leniency application form and communication issued in September 2014, which is provided on the website of the ComCo).

To secure its position with regard to timing, an undertaking that wants to make a leniency application can set a marker. A marker is a declaration that the undertaking will submit a leniency application. According to the leniency application form and communication issued in September 2014, the marker must contain at least the following information: name and address of the applying undertaking, declaration to have coordinated behaviour with other undertakings with the object or effect of a restriction of competition, declaration that a formal leniency application will be submitted, basic information on the restriction of competition (type and duration of infringement, the (other) involved undertakings, the affected products or services and markets). The position set by the marker is subject to a leniency application being subsequently submitted that fulfils the requirements. The ComCo recommends submitting markers

by e-mail.[4] Alternatively, markers can also be submitted by facsimile,[5] ordinary mail (not recommended) or stated orally (as a rule, in the offices of the ComCo; it is also possible to set a marker orally in the course of a dawn raid, however, only in coordination with the headquarters of the ComCo coordinating the dawn raid). It is not possible to set a marker by telephone. A leniency application (or marker) can only be filed individually, not jointly by two or more undertakings.[6]

The ComCo confirms in writing the receipt of the leniency application or marker, 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 has to produce further documents in 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 concerned. 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 not be directed against employees, but rather against the undertakings) and sanctions against employees by the employer, including the loss of the employment. As a general rule, it is advisable to seek independent legal advice.

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 agreements, and abuse of dominant position).[7] 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

4 E-mail: selbstanzeige@weko.admin.ch.

5 Fax: +41 58 462 20 53.

6 Article 8, Paragraph 1 of the CASO.

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

francs.[8] 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 before the imposition of the fine; 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 (the starting point for calculating the sanction) may amount to a maximum of 10 per cent of the turnover achieved by the undertaking in the relevant markets in Switzerland during the three financial years before the imposition of the fine (or, according to recent practice, before the end of the infringement). In cases of horizontal agreements, the basic amount of the 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 yet develop further.

Starting from the basic amount of the sanction, various factors are relevant for determining 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.

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

8 Articles 54 to 55 of the CartA.

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 circumstances according to Article 6 of the CASO is not exhaustive. In particular, cooperation outside a leniency application, the conclusion of a settlement with the ComCo, and severe and effective compliance programmes may also lead to the 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 possible discounts in the case of the conclusion of settlements and cooperation with the ComCo.

When calculating the amount of a sanction, as a first step the ComCo determines the basic amount of the sanction and takes into consideration the mitigating and aggravating circumstances. This leads to a subtotal. In the second step, the ComCo deducts from the subtotal the discount (i.e., the percentage as applicable) granted to an undertaking for a leniency application.

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*, before 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.

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 the ComCo's questions (in reply to information requests) and voluntarily providing information and documents concerning the facts that are the object of the investigation. As a rule, the more continuous, complete and expeditious cooperation is, the more likely and substantial a discount of the sanction will 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 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 scope of the procedural rights and defence rights is disputed). 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 with 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 concerned 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 the 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 and the causal link between the anti-competitive agreement and such damage must be established. 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.

In a decision issued in September 2014 (the first decision regarding access to the file by third parties in proceedings under the CartA, still unpublished at the time of writing), the ComCo stated that, after the closure of a proceeding (i.e., after the decision obtained legal force), access to the file (consisting of, in particular, the unredacted decision of the ComCo, if it was redacted, and pre-existing documents) is granted to third parties that were not parties to the proceeding before the ComCo based on the Swiss Data Protection Act. However, pursuant to this provision, granting a third party access to the file requires a balancing of interests. In this respect, the ComCo argued that, if documents submitted in the course of a leniency application are concerned, the public interest in the functioning of the leniency system and (interrelated with the public interest) the private interest of the undertaking having filed a leniency application should prevail. That is, according to this decision, information and documents filed by a leniency applicant are protected from access to the file by third parties. In contrast, documents filed by other parties (such as parties merely cooperating with the ComCo) would, as a rule, be made available. Even though the latter is not stated explicitly and would also be subject to a balancing of interests, this would be the probable outcome according to this decision. However, this is not a constant practice and has not yet been confirmed by a court. The decision of the ComCo has been appealed to the Swiss Federal Administrative Court. Hence, there is still legal uncertainty in this respect.

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 produce the relevant evidence concerning the leniency application under its control.

VIII CURRENT DEVELOPMENTS

A proposed revision of the CartA was rejected in Parliament in September 2014, which included the following elements:

a The institutions should have been 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.

b Article 5 was to 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).

c In addition, a motion was debated according to which a new provision would have been introduced into the CartA – a new Article 7a – so that undertakings distributing their products outside Switzerland in an Organisation for Economic Co-operation and Development (OECD) country at lower prices than in Switzerland would have been deemed as infringing the CartA if they refused to supply customers from Switzerland through their foreign distribution entities at the same prices and conditions, or if they took measures to prevent third parties from supplying into Switzerland. The ComCo itself opposed the introduction of this new provision mainly because it anticipated problems with regard to enforcement. However, there was significant political support for the introduction of this provision.

d The criteria for the assessment of concentrations (mergers) should have been amended by introducing the SIEC test (significant impediment to efficient competition), which is commonly applied in the EU. This amendment was not controversial and widely accepted.

e A provision should have been introduced according to which compliance programmes of undertakings would have explicitly led to a reduction of sanctions.

It is still unclear which elements of the revision that was rejected in Parliament as a package will again be taken up separately in a future revision. It may be expected that the introduction of the SIEC test for the assessment of concentrations (mergers) will again be taken up as it was not controversial. Furthermore, according to certain politicians, the introduction of a new Article 7a of the CartA cannot be excluded, according to which undertakings distributing their products outside Switzerland in an OECD country at lower prices than in Switzerland would be forced to supply customers from Switzerland through their foreign distribution entities at the same prices and conditions (see point c, *supra*).

Currently, relevant developments are emerging from the practice of the ComCo and of the courts. These developments include the issue of whether hard-core restrictions are *per se* prohibitions, the conditions for a leniency application and access to the file (see below).

As mentioned, the Swiss Federal Administrative Court issued two decisions in January 2014 establishing *per se* prohibitions in the case of hard-core restrictions according to Article 5, Paragraphs 3 and 4 of the CartA. Appeals against these decisions

of the Swiss Federal Administrative Court are pending. On the contrary, decisions of the Swiss Federal Administrative Court in September 2014 ruled that there is no such thing as a *per se* prohibition under Swiss competition law and that it must be established in every single case that competition has been significantly restricted by the agreement in question. The relationship between the earlier decisions and the latter decisions is not clear and it is also not clear how the Swiss Federal Supreme Court will decide. Therefore, it cannot be foreseen what the practice will be (see Section I, *supra*).

There is a debate around whether it should be possible to make a leniency application without confessing participation in conduct restricting competition; in particular, whether (at least) the participation in an agreement according to Article 4, Paragraph 1 of the CartA, must be notified and confessed 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 confessed and cannot be contested. There have been decisions by the Swiss Federal Administrative Court that seem to adopt a different approach. However, both the Swiss Federal Administrative Court's decisions and ComCo's practice cannot be considered as definitively determining the legal environment in which an undertaking would have to assess its case (see Section IV, *supra*).

Furthermore, the practice of the ComCo, according to which third parties that were not parties to the proceeding before the ComCo are granted access to the file after the closure of the proceeding, is being developed. In a recent decision, the ComCo stated that information and documents filed by a leniency applicant are protected from access to the file by third parties. In contrast, documents filed by other parties (such as parties merely cooperating with the ComCo) would, as a rule, be made available. However, this decision has not yet been tested before the courts. It remains to be seen how this practice will develop further (see Section VII, *supra*).

As 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*). Furthermore, a cooperation agreement on competition between Switzerland and the EU has been signed and enacted (see Section II, *supra*). Finally, 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).

Appendix 1

ABOUT THE AUTHORS

NICOLAS BIRKHÄUSER
Niederer Kraft & Frey Ltd

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

Mr Birkhäuser advises and represents clients in competition law matters concerning in particular merger control, compliance, market dominance and focuses in particular on 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.

NIEDERER KRAFT & FREY LTD
Bahnhofstrasse 13
8001 Zurich
Switzerland
Tel: +41 58 800 8000
Fax: +41 58 800 8080
nicolas.birkhaeuser@nkf.ch
www.nkf.ch