

# Cartel leniency in Switzerland: overview

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## REGULATION

### 1. What laws provide for a leniency programme and which regulatory authority administers it? Is there any published guidance?

#### Applicable laws and guidance

The following laws, regulations and guidelines apply:

- Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act).
- Ordinance on Sanctions imposed for Unlawful Restrictions of Competition 2004 (Ordinance on Sanctions).
- Explanatory Note "Remarks on the Ordinance on Fines" by the Competition Commission (COMCO).
- Explanatory Note and Form of the Secretariat of the Competition Commission (Secretariat) on Leniency Programme (Leniency Application) of 8 September 2014 (Status as of 1 January 2019).
- Explanatory Note of the Secretariat on Selected Instruments of Investigation of 6 January 2016.
- Explanatory Note of the Secretariat on Amicable Settlements of 28 February 2018.
- Explanatory Note of the Secretariat on Preliminary Investigation Procedure of 20 May 2020.
- Explanatory Note of the Secretariat on Investigation Procedure of 27 May 2020.
- Explanatory Note of the Secretariat on COMCO's Decision Procedure of 3 February 2020.

#### Regulatory authority

COMCO and the Secretariat have primary responsibility for enforcing the Cartel Act. COMCO is the deciding body in cartel matters, while the Secretariat conducts the investigations.

## SCOPE OF APPLICATION

### 2. What infringements of competition law does the leniency programme cover?

The sanctions that are of interest in connection with the leniency programme are the administrative sanctions under Article 49a of Cartel Act for first-time infringements of certain substantive law provisions. Only these sanctions are covered by the leniency programme.

Only certain practices may lead to sanctions in the case of a first-time infringement (that is, without violation of a prior order by, or settlement with, the COMCO):

- Hard-core horizontal and vertical agreements according to Article 5(3) and (4) of the Cartel Act.
- Abuse of dominant position according to Article 7 of the Cartel Act.

(Article 49a, Cartel Act.)

According to the revised Explanatory Note and Form of the Secretariat on Leniency Programme it must be assumed that a reduction of a sanction is also possible in cases of abuse of dominance, but only in the form of a partial, as opposed to a full reduction.

## RECENT CASES AND TRENDS

### 3. What notable recent cases have applied the leniency programme?

There have been several cases concerning various industries where the leniency programme has been applied. Recent decisions where leniency was granted to one or more of the parties include, among others, cartels in the areas of distribution of automobiles (August 2014), door fittings (December 2014), tunnel cleaning (March 2015), grand and upright pianos (December 2015), construction work in the geographic areas of See-Gaster (July 2016), Muenstertal (July 2017) and Engadin (October 2017 and March 2018) as well as further construction work cases, galvanising plants (October 2017), gasoline for appliances (February 2018), foreign exchange FX (June 2019) and automobile leasing (July 2019).

## AVAILABILITY OF LENIENCY

### Administrative liability

### 4. Is full immunity from administrative penalties available? What conditions must be met for immunity to be granted?

Full immunity from administrative fines is granted if an undertaking is the first to either:

- Provide information enabling the COMCO to open an in-depth investigation under Article 27 of the Cartel Act, provided that 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 Cartel Act.
- Provide evidence enabling COMCO to establish a hard-core horizontal or vertical agreement, provided that:
  - no undertaking has already been granted conditional immunity from fines; and
  - that COMCO did not have at the time of submission sufficient evidence to establish the infringement of Swiss competition law.

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However, immunity will only be granted if the undertaking:

- Did not coerce any other undertaking to participate in the infringement and was not an instigator or a leader of the cartel.
- Voluntarily submits all information or evidence in its possession concerning the unlawful practice in question to COMCO.
- Co-operates on a continuous basis and expeditiously throughout COMCO's administrative procedure.
- Discontinues its involvement in the infringement no later than the time of the leniency application (voluntary report) or when ordered to do by COMCO.

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## 5. Is there a sliding scale of available leniency from administrative penalties?

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An undertaking, which does not benefit from full immunity, can benefit from a reduction of the sanction of up to 50% if it fulfils the following criteria:

- Submits the leniency application (or marker) after the first undertaking and/or does not meet the conditions for full immunity.
- Has co-operated on an unsolicited basis with the Secretariat and COMCO.
- Ended its involvement in the infringement no later than the time at which it submitted evidence.

The amount of the reduction of a sanction depends on the importance of the contribution to the success of the proceedings, which depends on, in particular, the timing, quality and quantity of the information and evidence submitted.

An undertaking can benefit from a reduction of the sanction of up to 80% (amnesty plus) where both:

- The undertaking provides information to the Secretariat and COMCO about other hard-core restrictions within the meaning of Article 5(3) and (4) of the Cartel Act.
- The hard-core restrictions were unknown to the Secretariat and COMCO at the time of denunciation.

Any undertaking that did not submit a leniency application, but co-operated with the Secretariat and COMCO (which is taken into account as a mitigating factor) can, according to the current practice of COMCO, benefit from a reduction of the sanction of up to 20%. The Secretariat considers acknowledgement of the facts of the case as exceptionally good co-operation for undertakings that did not submit a leniency application and rewards this with a maximum reduction of 20%.

In cases of settlements with COMCO without a leniency application, fine reductions (according to the practice of COMCO) are in the range of about:

- 5% (if made after the Secretariat sent the draft order to the parties).
- 10% (if made late).
- 15% (if made in the middle range).
- 20% (if made early).

In cases of settlements within a leniency application, fine reductions of 10% to 20% may be expected (if made early and satisfactory from the point of view of COMCO, the maximum is 20%). The Explanatory Note on Amicable Settlements overrules previous practice, where a discount of 25% for an amicable settlement was granted in one case.

When calculating the amount of a sanction, COMCO will carry out the following four steps:

- Step one: COMCO determines the basic amount.
- Step two: COMCO increases the basic amount based on the duration of the infringement. According to the Ordinance on Sanctions imposed for Unlawful Restrictions of Competition 2004, if the infringement has lasted for one to five years, the basic amount is increased by up to 50% (usually 0.8333% per month), if longer, by up to 10% for each additional year.
- Step three: COMCO increases and/or decreases the sanction, taking into consideration the mitigating and aggravating circumstances (including co-operation other than in the form of a leniency application). Discount for a possible settlement is part of the discount for co-operation.
- Step four: COMCO deducts from the subtotal, (resulting from steps one to three) the discount (that is, the percentage as applicable) granted to an undertaking for a leniency application.

With regard to the calculation of the discount, the following applies (please note that the numbers and calculation methodology correspond to the practice of COMCO, which is developing and may change):

- If no leniency application is made: for the conclusion of a settlement without a leniency application (maximum 20%) and for the co-operative conduct (maximum 20%), both discounts are added together, leading to a maximum discount of 40% (according to the latest practice and the Explanatory Note of the Secretariat on Amicable Settlements).
- If a leniency application is made: for the conclusion of a settlement within a leniency application (maximum 20%) and for the leniency application (maximum 50%, if going in second or later), the discount for the settlement is a part of the discount for co-operation, while the discount for the leniency application is separate. There is no further discount for co-operative conduct because it is included in the discount for the leniency application. First the discount for the settlement (co-operation) is applied and a subtotal is calculated, then the discount for the leniency application is applied, leading to a maximum discount of 60% (that is, the maximum 20% and the maximum 50% are not added together).

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## 6. Is immunity or leniency for administrative penalties available to individuals? If so, what conditions apply?

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Only undertakings can be sanctioned for first-time infringements against the substantive law provisions of Article 5(3) and (4) or Article 7 of the Cartel Act, which are covered by the leniency programme. Individuals can act as private undertakings and, in such capacity, can be fined. However, to date COMCO has not imposed sanctions against individuals acting as undertakings. COMCO considered individuals as undertakings in the case of *hors list pharmaceuticals (RPW 2010/4 649 et seqq.)* but refrained from imposing sanctions due to procedural reasons.

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## Criminal liability

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### 7. Is immunity or leniency available for companies and/or its employees in relation to criminal prosecution? What are the implications for employees when an undertaking has been granted immunity or leniency?

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#### Circumstances

Companies are not subject to criminal sanctions under the Cartel Act. Individuals who are subject to criminal sanctions, cannot be sanctioned for first-time infringements against the substantive law provisions of the Cartel Act. They can only be sanctioned for wilful infringements of settlements and administrative orders, the obligation to provide information and certain other infringements. No immunity or leniency is available for these infringements.

#### Proceedings against employees

There are no criminal sanctions against individuals for first-time infringements against the substantive law provisions of the Cartel Act. However, individuals acting for an undertaking may be fined up to CHF100,000 if they wilfully violate a settlement decision, a final and non-appealable order of COMCO or the Secretariat or a decision of an appellate body (courts).

Individuals who intentionally fail to comply or only partly comply with the obligation to provide information in an ongoing investigation can be fined up to CHF20,000.

#### Employees' interests

Individuals cannot be sanctioned for first-time infringements against the substantive law provisions of the Cartel Act (see above, *Circumstances*). They can only be sanctioned for other infringements, such as if they intentionally fail to comply or only partly comply with the obligation to provide information in an ongoing investigation (see above, *Proceedings against employees*). No immunity or leniency is available for these infringements.

However, employees may face sanctions by their employers (for example, where the employer undertaking is being investigated) or may even be subject to claims for damages by the employer if they acted wrongfully. Employees, therefore, require legal representation of their own.

## APPLICATION PROCEEDINGS

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### 8. When should an application for leniency be made?

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There is no deadline for applying for leniency. However, timing of the application is relevant because only the first leniency applicant can qualify for full immunity from a sanction (see *Question 4*). Additionally, the amount of the reduction of a sanction for undertakings that do not go in as the first will also (but not only) depend on timing. The amount of the reduction of a sanction for subsequent leniency applications depends on the importance of their contribution to the success of the proceedings, that is in particular, the timing, the quality and the quantity of the information and evidence submitted.

### 9. What are the procedural rules for leniency applications?

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#### Relevant authority

An application for leniency (or a marker) must be submitted to the Secretariat.

#### Applicant

A leniency application (or marker) can be submitted by the undertaking itself or by its representative. A leniency application can only be submitted by a single undertaking.

#### Informal/confidential guidance

It is possible to file a leniency application anonymously, for example, by using an attorney as an intermediary. The Secretariat will subsequently inform the undertaking by letter whether the conditions for immunity from a sanction are met and set a deadline within which it must reveal its identity. Additionally, it is possible to contact the Secretariat informally before filing a leniency application.

#### Form of application

An Explanatory Note and Form of the Secretariat on Leniency Programme (Explanatory Note) is provided on COMCO's website ([www.weko.admin.ch](http://www.weko.admin.ch)). The Explanatory Note is available in:

- German ([www.weko.admin.ch/dam/weko/de/dokumente/2019/Merkblatt%20und%20Formular%20Bonusregelung%20\(Selbstanzeige\).pdf.download.pdf/Merkblatt%20und%20Formular%20Bonusregelung%20\(Selbstanzeige\).pdf](http://www.weko.admin.ch/dam/weko/de/dokumente/2019/Merkblatt%20und%20Formular%20Bonusregelung%20(Selbstanzeige).pdf.download.pdf/Merkblatt%20und%20Formular%20Bonusregelung%20(Selbstanzeige).pdf)).
- French ([www.weko.admin.ch/dam/weko/fr/dokumente/2019/note\\_explicativeetformulairedeprogrammedeclemenceautodenonciatio.pdf.download.pdf/note\\_explicativeetformulairedeprogrammedeclemenceautodenonciatio.pdf.pdf](http://www.weko.admin.ch/dam/weko/fr/dokumente/2019/note_explicativeetformulairedeprogrammedeclemenceautodenonciatio.pdf.download.pdf/note_explicativeetformulairedeprogrammedeclemenceautodenonciatio.pdf.pdf)).
- Italian ([www.weko.admin.ch/dam/weko/it/dokumente/2019/circolare\\_e\\_modulodiprogrammadiclemenzaautodenuncia.pdf.pdf.download.pdf/circolare\\_e\\_modulodiprogrammadiclemenzaautodenuncia.pdf.pdf](http://www.weko.admin.ch/dam/weko/it/dokumente/2019/circolare_e_modulodiprogrammadiclemenzaautodenuncia.pdf.pdf.download.pdf/circolare_e_modulodiprogrammadiclemenzaautodenuncia.pdf.pdf)).
- English (unofficial translation) ([www.weko.admin.ch/dam/weko/en/dokumente/2019/explanatory\\_noteandformoftheleniencyprogramvoluntaryreport.1.pdf.download.pdf/explanatory\\_noteandformoftheleniencyprogramvoluntaryreport.1.pdf.pdf](http://www.weko.admin.ch/dam/weko/en/dokumente/2019/explanatory_noteandformoftheleniencyprogramvoluntaryreport.1.pdf.download.pdf/explanatory_noteandformoftheleniencyprogramvoluntaryreport.1.pdf.pdf)).

It is recommended in the Explanatory Note to send a leniency application (or marker) to COMCO by e-mail ([leniency@comco.admin.ch](mailto:leniency@comco.admin.ch); [selbstanzeige@weko.admin.ch](mailto:selbstanzeige@weko.admin.ch)) or via e-Marker filing form ([www.weko.admin.ch/weko/de/home/dienstleistungen/meldeformulare/e\\_marker.html](http://www.weko.admin.ch/weko/de/home/dienstleistungen/meldeformulare/e_marker.html)).

It is also possible to deliver a leniency application in person or to have it delivered by a representative. Additionally, delivery by mail is possible but not recommended. The fastest is a submission by e-mail (this also allows to clearly determine the date and time of the submission). The receipt of the e-mail is automatically confirmed. It is not possible to submit a leniency application (or to set a marker) by phone or fax. See also, *Oral statements*.

#### Markers

It is possible to submit and obtain a marker. The Explanatory Note provides a form of a marker (see above, *Form of application*).

#### Information/evidence

A leniency applicant is expected to provide the following information:

- Information on the reporting undertaking, including: company name, legal form, address, place of residence/headquarters, contact person, phone number.
- Alleged infringement of competition.
- Undertakings participating in the alleged infringement of competition.

- The relevant markets concerned and description of these markets.
- Objects and effects of the restraint of competition.
- Evidence.
- Other leniency applications and procedures.
- Other notes and comments.

(Explanatory Note.)

The Secretariat has repeatedly stated that a leniency application must at least include an admission of the participation in an agreement under Article 4(1) of the Federal Act on Cartels and Other Restraints of Competition (Cartel Act) subject to potential sanctions. According to the latest COMCO practice, admission of the description of the facts (including the existence of an agreement under Article 4(1) of the Cartel Act) is required. Additionally, according to the Secretariat, an undertaking making a leniency application must, in principle, also admit the effects on the market.

Appeals are currently pending against COMCO decisions. The Federal Administrative Court stated in three decisions rendered in September 2014 concerning one COMCO investigation that information or evidence provided with a leniency application only relates to the facts of a case and that, in any case, a leniency application does not prevent a party from holding a different legal opinion. COMCO appealed two of the three decisions of the Federal Administrative Court, which do not treat all issues equally, and has, at the time of writing, not adapted the Explanatory Note and Form of the Secretariat on Leniency Programme to reflect the mentioned decisions. There is currently no legal certainty with regards to the question of what a leniency applicant must admit and may not contest (such as the existence of an agreement under Article 4(1) of the Cartel Act). The Federal Supreme Court subsequently rendered its decisions without answering the question as to whether an admission of the participation in an agreement under Article 4(1) of the Cartel Act must be included in a leniency application. These cases, are again, pending before the Federal Administrative Court and the two different approaches of the Federal Administrative Court and COMCO will probably remain contradictory until the Federal Supreme Court issues a final decision covering the relevant issues.

Obviously, the more information a leniency applicant admits, the safer it is to be regarded that the Secretariat and COMCO would accept a leniency application.

#### Oral statements

It is possible, in agreement with the Secretariat, to make an oral statement on record at COMCO's premises. See also *Question 16, Domestic submissions and foreign discovery*.

It is not possible to submit a marker by phone or orally with the Secretariat's search team on-site during a search (dawn raid). However, it is possible to submit a marker by making an oral statement on record. This is possible only in agreement with the head of the search team who determines the modalities and coordinates with the head of operations of the Secretariat. This procedure may be slower than a submission by e-mail.

#### Short-form applications

Not applicable.

## 10. What are the applicable procedures and timetable?

The date and time of a marker determines the rank of a leniency application, so long as a leniency application is subsequently submitted that satisfies the requirements to grant complete or partial immunity from the sanction. The submission of a marker is not a condition for the submission of a leniency application, which may also be submitted directly.

The Secretariat acknowledges receipt of the leniency application without delay, indicating the date and time of the receipt. In the case of a submission by e-mail, receipt of the e-mail is automatically confirmed. For an oral leniency application, the Secretariat may refrain from handing over the acknowledgement and allow the undertaking to consult it on-site (procedure without correspondence).

If the Secretariat finds that the leniency application is incomplete, it informs the undertaking of any additional information the undertaking must submit and sets a deadline for this purpose. If, after a final deadline, the leniency application is not completed, the undertaking loses its position in the ranking. It will then, in the order of the markers, be determined whether another leniency applicant is in a position, as the first, to submit a complete leniency application.

As soon as the Secretariat determines that the leniency application fulfils the requirements for full immunity from a sanction, it informs the undertaking (in practice, this often takes considerable time). Subsequently received leniency applications are reviewed only after a decision concerning the first leniency application has been reached.

If the Secretariat decides that the leniency applicant qualifies for full immunity, COMCO (which has sole authority to impose fines, is bound by the statement of the Secretariat. This means that COMCO can only deviate from this assurance when it issues its final decision if it subsequently becomes aware of additional circumstances as specified in *Question 4* that disqualify an undertaking from leniency.

## WITHDRAWAL OF LENIENCY

### 11. In what circumstances and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants?

#### Before COMCO's final decision

The first leniency applicant may lose its position in the ranking if either:

- The first leniency application is deemed incomplete by the Secretariat.
- The leniency applicant did not admit enough or contested certain facts and assumptions (such as the existence of an agreement under Article 4(1) of the Cartel Act). There is no legal certainty on the question of what a leniency applicant must admit and may not contest (see *Question 9*).
- The Secretariat or COMCO become aware of additional circumstances, as specified in *Question 4*, that disqualify an undertaking from leniency.

It will then be determined, in the order of the markers, whether another leniency applicant, as the new first applicant, is in a position to submit a complete leniency application.

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## After COMCO's final decision

COMCO may withdraw immunity from a sanction previously granted to a leniency applicant if the applicant appeals a decision and (necessarily) contests certain facts and assumptions (such as the existence of an agreement under Article 4(1) of the Cartel Act). There is no legal certainty on the question of what a leniency applicant must admit and may not contest (see *Question 9*).

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## SCOPE OF PROTECTION

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### 12. What is the scope of leniency protection after it has been granted?

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As a rule, leniency applies insofar as the infringing activities are exclusively revealed in information provided by the leniency applicant to the Secretariat. It also, however, applies where the authority collects further evidence of the same infringing activities. The question whether an undertaking qualifies for full or partial immunity or what will be the amount of the reduction of a sanction may depend on which information was submitted by the undertaking and which information was collected by the Secretariat.

Leniency protection only applies to the particular infringement specified in an application. If during the investigation for that infringement the Secretariat discovers a second infringement, the second infringement cannot be protected under the original application and a separate application must be submitted.

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### 13. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it is the first to disclose restrictive agreements and practices in another market (leniency plus)?

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Where an undertaking provides information to the Secretariat and COMCO about other hard-core restrictions within the meaning of Article 5(3) and (4) of the Cartel Act, and these hard-core restrictions were unknown to the Secretariat and COMCO at the time of denunciation, the undertaking may benefit from a reduction of up to 80% (instead of up to 50% if it did not go in first) in the first proceeding (amnesty plus).

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### 14. Does the grant of leniency affect a third party's ability to bring a follow-on damages action against a leniency applicant?

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There is no obvious reason why the grant of leniency should affect a third party's ability to bring a follow-on damages action against a leniency applicant as the leniency programme does not affect the civil consequences of a competition law infringement. However, to the author's knowledge the question has not yet been addressed by the Federal Supreme Court. One issue in this context may be that COMCO grants access to the files of leniency applicants more restrictively than to the files of parties that have not applied for leniency or that it may not grant access at all. However, this practice is developing and subject to court decisions.

COMCO's decisions are not binding on civil courts. Civil courts may tend to follow COMCO's opinion so that a COMCO decision or an appellate decision may as a rule be expected to facilitate follow-on claims. However, it rests with the civil court to legally assess the evidence produced by the parties.

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## CONFIDENTIALITY AND DISCLOSURE

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### 15. What are the rules relating to confidentiality during a leniency application?

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#### Identity disclosure

The Secretariat treats the identity of leniency applicants as confidential. However, the identity of leniency applicants will be disclosed in the course of the access to the file (see *below, Identity disclosure*) and if an undertaking waives its right to confidentiality, for example by publicly announcing that it submitted a leniency application. The Secretariat normally informs the public in a media release, which is also published on its website, that one or several leniency applications have been submitted during an investigation (without disclosing the identity of the applicants).

It cannot be excluded that, particularly in investigations with a small number of parties, conclusions may be drawn on the identity of leniency applicants earlier in the proceeding.

#### Information disclosure

The Secretariat maintains a separate file for the information and evidence submitted with the leniency application, which is independent from the other case files. Access to the physical and electronic documents of the file of the leniency application is limited to the members of the Secretariat's case team.

As a rule, access to the leniency application file is only granted when the Secretariat sends its draft order (similar to the statement of objections) to the parties for comment. As an exception, access to the file may be granted earlier, particularly if an amicable settlement is being negotiated. Business secrets must be protected (see for general guidance the Explanatory Note "Business Secrets" of 30 April 2008; available in German ([www.weko.admin.ch/dam/weko/de/dokumente/2008/12/Merkblatt\\_Gesch%C3%A4ftsgeheimnisse\\_2008.pdf.download.pdf/Merkblatt\\_Gesch%C3%A4ftsgeheimnisse\\_2008.pdf](http://www.weko.admin.ch/dam/weko/de/dokumente/2008/12/Merkblatt_Gesch%C3%A4ftsgeheimnisse_2008.pdf.download.pdf/Merkblatt_Gesch%C3%A4ftsgeheimnisse_2008.pdf)), French ([www.weko.admin.ch/dam/weko/fr/dokumente/2006/01/merkblatt\\_geschaeftsgeheimnisse.pdf.download.pdf/aide-memoire\\_secretsdaffaires.pdf](http://www.weko.admin.ch/dam/weko/fr/dokumente/2006/01/merkblatt_geschaeftsgeheimnisse.pdf.download.pdf/aide-memoire_secretsdaffaires.pdf)) and Italian ([www.weko.admin.ch/dam/weko/it/dokumente/2019/Circolare\\_segreti\\_d\\_affari\\_20.12.pdf.download.pdf/Circolare\\_segreti\\_d\\_affari\\_20.12.pdf](http://www.weko.admin.ch/dam/weko/it/dokumente/2019/Circolare_segreti_d_affari_20.12.pdf.download.pdf/Circolare_segreti_d_affari_20.12.pdf)).

When granting access to the file during the proceeding, the Secretariat must balance the competing interests of the parties' right to effective defence and of the public in preserving the leniency programme as well as of the leniency applicant in keeping the information and the documents confidential. The Secretariat observes the following principles and distinguishes between the leniency application itself (corporate statement) and its annexes (that is, pre-existing evidence):

- Access to the leniency application (corporate statement) is allowed exclusively at the premises of the Secretariat, independently of the form (written or oral) of the leniency application. Any form of copying (scans, photos and so on) is prohibited. This applies as a general rule to the leniency applicant as well as to the other parties of the proceedings. However, the taking of notes or using a dictation device during access to the file is permitted. The Federal Administrative Court confirmed the restrictions to the access to the file in a recent decision, stating that these restrictions serve an important public interest function and that the right to an effective defence is not violated because the volume of the files that were restricted to on-site inspection was limited.
- Access to the annexes of the leniency application (that is, pre-existing evidence) depends on their volume. Access in principle takes place at COMCO's premises. However, if the volume is such that an on-site consultation is unreasonable for the parties and if this prevents them from exercising their right to effective

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defence, copies will be provided to the parties to the investigation (usually in electronic form), with restrictions as to the extent of their use. This means the copies provided to the parties may be used exclusively for the preparation of the defence in the ongoing administrative cartel proceeding before COMCO and its Secretariat but not in civil, criminal and foreign procedures.

(*Explanatory Note and Form of the Secretariat on Leniency Programme*.)

According to the Explanatory Note and Form of the Secretariat on Leniency Programme, the leniency applicant can further indicate that the leniency application was filed voluntarily and request the Secretariat to undertake to keep the application confidential under the Act on Freedom of Information in the Administration so that the leniency application need not be made accessible on the grounds of this Act.

### Confidentiality requests

It is possible to initially file a leniency application anonymously. However, the leniency applicant must subsequently reveal its identity in an early phase of the proceeding (*see above, Identity disclosure and Information disclosure*) (*see also Question 9, Informal/confidential guidance*). In particular, business secrets and personal data must be protected.

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## 16. What are the rules concerning disclosure of statements made in support of a leniency application?

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### Domestic submissions and domestic discovery

In general, there is no exchange of information between COMCO and the Secretariat, and the Swiss civil courts. Discovery orders are not available under Swiss law. However, third party claimants may seek to obtain information and documents in particular as follows:

- Third parties may request participation in the investigation within 30 days from the publication of the opening of an investigation by the Secretariat. The publication of the opening contains an invitation to third parties to come forward within 30 days if they wish to participate in the investigation. As a party to the proceeding, the third party has access to the file; however, subject to important limitations (*see Question 15*).
- Third parties may request access to information and documents based on the Act on Freedom of Information in the Administration (AFIA). However, leniency applicants (and to a certain extent also other parties) may indicate that the information was filed voluntarily and ask that it be kept confidential under the AFIA.
- Third party claimants can, in proceedings before a civil court, request from the court that it order the counterparty or third parties to issue documents that are in their possession. However, this is subject to several conditions. Additionally, there are no sanctions and no coercive measures against the counterparty, but only against third parties, if they do not comply with the order.

### Domestic submissions and foreign discovery

COMCO and the Secretariat have introduced a number of measures to protect leniency applicants. These measures include that the leniency application can be put on record orally at the premises of COMCO (oral leniency application). The reporting undertaking must provide the necessary man-power resources for the recording. The reporting undertaking may use the IT equipment of the Secretariat for the recording. In addition to oral leniency applications, paperless proceedings and restricted access to the files are measures introduced by COMCO and the Secretariat. However, these measures have not been tested in court to date. Furthermore, the Secretariat and COMCO recently limited the types

of submissions within leniency proceedings that can be submitted orally, and which therefore form part of a paperless proceeding.

See also *Question 15* and *Question 17*.

### Foreign submissions and domestic discovery

Discovery orders are not available under Swiss law. However, third party claimants in proceedings before a civil court can seek to obtain information, and documents in particular, by requesting from the court that it order the counterparty or third parties to issue documents that are in their possession. However, this is subject to several conditions. In addition, there are no sanctions and no coercive measures against the counterparty, but only against third parties, if they do not comply with the order.

Additionally, as a rule, the HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 (Hague Evidence Convention) allows judicial authorities in a contracting state to obtain evidence from parties domiciled abroad, or to perform some other judicial act. The request can be through a letter of request addressed to a central authority designated by the other contracting state (letter rogatory).

### Domestic discovery by other authorities

In cases involving bid rigging cartels in the Swiss construction industry, communes and cantons (mostly public authorities, but to some extent also private undertakings, as the aggrieved parties), can request access to the file under the Federal Act on Data Protection (FADP) based on the fact that the files contain their personal data.

It should, however, be noted that bid rigging cartels are peculiar in this respect, as in most of the other cases the case files do not contain any personal data on the aggrieved parties (which is why it is not possible to act based on the FADP). In September 2016, the Federal Administrative Court confirmed a decision of COMCO to grant communes access to the final order and parts of the case file. However, COMCO did not grant access to the documents submitted by leniency applicants. Whether access to the leniency documents would be possible for communes and cantons under the FADP was not contested before the Federal Administrative Court, which is why there is currently no legal certainty regarding this point.

See also *Question 17*.

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## INTER-AGENCY CO-OPERATION

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### 17. Does the regulatory authority in your jurisdiction cooperate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?

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A co-operation agreement on competition between Switzerland and the EU was enacted on 1 December 2014. The co-operation agreement is a second-generation agreement. Information may be exchanged between COMCO and the European Commission even if there is no consent of the undertaking concerned provided that:

- Both competition authorities are investigating the same or related conduct or transaction.
- This conduct or transaction is also unlawful under Swiss law.

However, new provisions in the Cartel Act provide, among others, that the exchange of information or documents is not permitted if the information was made available in the context of a leniency or settlement procedure unless the leniency applicant has given its consent and if the data is used or made available by the foreign competition authority in criminal or civil proceedings. COMCO and the Secretariat must notify the undertaking concerned and invite it to state its views before transmitting the data to the foreign competition authority.

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Apart from the co-operation agreement between Switzerland and the EU, there are currently no relevant agreements in force on mutual administrative assistance between Switzerland and other countries on competition, with two exceptions:

- Bilateral air services agreement between Switzerland and the EU.
- Bilateral trade agreement between Switzerland and Japan.

In this context, COMCO has successfully based requests on Hague Evidence Convention to obtain information from parties domiciled in a foreign jurisdiction (France). The Hague Evidence Convention allows judicial authorities in a contracting state, by means of a letter of request to be addressed to a central authority designated by the other contracting state (letter rogatory), to obtain evidence, or to perform some other judicial act.

COMCO's case-specific co-operation with other competition authorities will currently primarily consist of co-operation with the European Commission.

## WHISTLEBLOWERS

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### 18. Are there any whistleblower tools for individuals to report competition violations/cartels?

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#### Whistleblower tools

There is currently no law or ordinance in Switzerland that stipulates rules regarding whistleblowing and that protects whistleblowers. However, COMCO has introduced measures that allow whistleblowers to anonymously report cartels and anti-competitive practices.

The Secretariat is responsible for receiving and processing reports by whistleblowers.

Generally, every communication channel is open to whistleblowers. If a whistleblower contacts the Secretariat by telephone, he/she must ask for the head of the Investigations Competence Center (Mr Simon Bangerter) or his deputy (Mr Patrick Kaeser). A whistleblower can also contact the Secretariat by email ([whistleblowing@weko.admin.ch](mailto:whistleblowing@weko.admin.ch)). The information submitted by a whistleblower is treated as confidential within the Secretariat and COMCO. It is also possible to use the general contact form of COMCO.

Reports can be submitted by whistleblowers anonymously. If a whistleblower discloses his/her identity, the Secretariat and COMCO must not disclose it. The Secretariat and COMCO are bound by official secrecy: any violation of official secrecy would be subject to prosecution. If the Secretariat and COMCO use information submitted by a whistleblower, they must discuss with the whistleblower how this information will be structured, so that no conclusions relating to the whistleblower can be drawn. The Federal Criminal Court has previously expressly permitted such anonymisation in a ruling.

COMCO notes that, if a person wants to report participation in a suspected cartel or anti-competitive practice in the name of and on behalf of an undertaking, the instrument of a leniency application is available, which can lead to a reduction of a potential sanction.

#### Whistleblower protection

There is currently no law or ordinance in Switzerland that stipulates rules regarding whistleblowing and that protects whistleblowers. However, COMCO has introduced measures that allow whistleblowers to anonymously report cartels and anti-competitive practices.

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### 19. Is there a reward for individuals who report competition violations/cartels?

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There is no reward for individuals who report cartels or anti-competitive practices.

## PROPOSALS FOR REFORM

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### 20. Are there any proposals for reform?

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A proposed revision to the Cartel Act was rejected by the Swiss Parliament in September 2014. It is unclear which elements of the revision that were rejected in Parliament as a package will again be taken up separately in a future revision. The State Secretariat for Economic Affairs (SECO) issued a white paper in 2018 to discuss possible amendments, which do not influence cartel leniency.

A popular initiative to amend the Federal Constitution (and indirectly the Cartel Act) was submitted with the aim to lower prices, which would also implement the concept of relatively market dominant undertakings. The Federal Council drafted an indirect counterproposal, which would also implement the concept of relatively market dominant undertakings. According to the current debate, the concept of "relatively market dominant undertakings" would not only (as was previously envisaged) be implemented in the context of suppliers of goods and services outside of Switzerland for sales to Swiss purchasers, but as a general provision in the Cartel Act. The popular initiative and the indirect counterproposal do not envisage direct sanctions for relatively market dominant undertakings.

Currently, relevant developments are emerging from the practice of COMCO and of the courts. These developments include, among others:

- The issue that hard-core restrictions are per se prohibitions, whereby a significant effect on competition is not required (see *Country Q&A, Restraints of trade and dominance in Switzerland: overview*).
- The conditions for a leniency application (see *Question 9*).
- Access to the file (see *Question 15*).

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## Practical Law Contributor profile

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