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Information Exchange and Related Risks

A Jurisdictional Guide

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I. Applicable Laws, Regulations and Principles

The Federal Act on Cartels and Other Restraints of Competition (Cartel Act, CartA) sets out rules on cartels or other agreements affecting competition, the abuse of market power and merger control.

In addition to the Cartel Act, there are a vast number of ordinances, notices and explanatory notes. The notices and explanatory notes are not legally binding. However, they outline how the Competition Commission (COMCO) interprets and applies the law and are, therefore, of great relevance. For the purposes of this chapter, the following are important:

- Notice Regarding Agreements of Minor Importance (*de minimis* notice) of 19 December 2005
- Notice Regarding Vertical Restraints of 28 June 2010, and its Explanatory Note of 12 June 2017
- Ordinance on Sanctions imposed for Unlawful Restrictions of Competition (Cartel Act Sanctions Ordinance, CASO);
- Explanatory Note "Remarks on the Ordinance on Fines" by the Competition Commission
- Explanatory Note and Form of the Secretariat of the Competition Commission on Leniency Programme (Leniency Application) of 8 September 2014
- Explanatory Note of the Secretariat of the Competition Commission on Amicable Settlements of 28 February 2018.

Furthermore, the Guidelines of the European Commission regarding horizontal co-operation agreements may be considered. These guidelines are not applicable in Switzerland. However, COMCO aims to apply the same rules as in the European Union by analogy. Therefore, the guidelines may be taken into account and used for guidance and interpretation purposes in Switzerland. However, it is important to note that COMCO does not always apply the same competition law rules as in the European Union.

1. Unlawful Behaviour According to the Cartel Act

A. *Scope of Application of the Cartel Act*

The Cartel Act applies to all practices that have an effect on competition in Switzerland, even if they originate in another country (Art 2 para 2 CartA). However, there is no need to demonstrate an appreciable effect on competition in Switzerland to apply the Cartel Act to practices that originate in another country. As a consequence, the Cartel Act applies to any behaviour that may have an impact on competition in Switzerland, regardless of whether such impact is actually noticeable.

The Cartel Act applies inter alia to undertakings that are parties to cartels or other agreements affecting competition (competition agreements; *Wettbewerbsabreden*). According to Article 4 paragraph 1 CartA, competition agreements are binding or non-binding agreements

and concerted practices between undertakings operating at the same or at different levels of production which have a restraint of competition as their object or effect. Thus, the Cartel Act operates with a comparatively broad definition of "agreement" that encompasses not only classic contract-like forms of cooperation but also other types of behavioural adaptations.

B. *Prohibited Types of Competition Agreements*

Some competition agreements are regarded as harmful to effective competition and are therefore prohibited. According to the strict wording of the Cartel Act, there are no agreements or practices that can be treated as automatically (per se) unlawful (Art 5 CartA). However, the following agreements are presumed to eliminate effective competition pursuant to Article 5 paragraphs 3 and 4 CartA (so-called hardcore restrictions):

- Horizontal agreements between actual or potential competitors to directly or indirectly fix prices, limit the quantities of goods or services to be produced, purchased or supplied, or allocate markets geographically or according to trading partners.
- Vertical agreements between undertakings at different levels of the production and distribution chain that set fixed or minimum resale prices or allocate territories in distribution contracts, to the extent that sales by other distributors into those territories are not permitted.

Nevertheless, the legal presumption under Article 5 paragraphs 3 and 4 CartA can, in principle, be rebutted by establishing that competition is not in fact eliminated by the agreement or practice in question. If the legal presumption is rebutted, according to Article 5 paragraph 1 CartA, the agreement or practice must then be assessed as to whether it significantly restricts competition. However, the Federal Supreme Court ruled that agreements regarding prices, territories, trading partners, or quantities of goods or services that fall under Article 5 paragraphs 3 and 4 CartA (that is, hardcore horizontal and vertical restrictions) qualify, in principle, as significant restrictions on competition due to their quality (i.e. their object) even if the presumption of the elimination of competition is rebutted.[1] According to this decision, the requirement for a significant effect on competition is only a *de minimis* clause when hardcore restrictions are in question, and quantitative criteria (such as the market share of the involved parties) therefore need not be taken into account. In essence, the horizontal and vertical hardcore restrictions of Article 5 paragraphs 3 and 4 CartA are prohibited per se, subject only to a justification on grounds of economic efficiency (see below). Federal Courts and COMCO have since applied this new practice in several cases.

Under Article 5 paragraph 2 CartA, agreements that are found to significantly affect competition can be justified on grounds of economic efficiency if:

- they are necessary to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
- they will not enable the parties involved to eliminate effective competition.

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[1] Federal Supreme Court Decision 2C_180/2014 of 28 June 2016 (BGE 143 II 297); Gaba/Gebro. Pierre Kobel, "Switzerland: The Swiss Supreme Court offers an interpretation of the legal presumptions of illegality set forth in the Swiss Cartel Act leading to the recognition of infringements by object, which may be sanctioned unless justified on grounds of economic effectiveness (Colgate-Palmolive; Gebro Pharma)", Concurrences N° 3-2017, Art N° 84641, 174–176.

The list of grounds of economic efficiency according to Article 5 paragraph 2 lit. a CartA is conclusive. The Federal Supreme Court stated that, for a competition agreement to be justified on the grounds of economic efficiency, it must be *necessary* to achieve economic efficiency, with no other option available that is less restrictive of competition. This poses a major obstacle and is in fact almost insurmountable, since, in practice, it will always be possible to imagine less far-reaching measures with which the same objective could (perhaps) have been achieved. There is therefore de facto a per se prohibition for horizontal and vertical hardcore restrictions under Article 5 paragraphs 3 and 4 CartA, as there is no realistic possibility of justification on grounds of economic efficiency.

II. Types of Information Exchange That May Be Caught under the Competition Rules

Information exchange can be categorised into the following types:

- *Autonomous or stand-alone information exchange*: The information exchange itself constitutes a competition agreement (in the form of an agreement or concerted practice). In this case, the main economic function lies in the exchange of information itself. If the information exchange constitutes itself a competition agreement, it is assessed independently pursuant to the relevant criteria of the Cartel Act (see Section III.2).
- *Ancillary information exchange*: The information exchange is part of another (competition) agreement (e.g. the parties to an agreement share certain information on costs or prices) or cartel, or takes place in the context of a specific transaction (e.g. information exchange in the context of M&A transactions). In this case, the information exchange is assessed as part of the assessment of the agreement or transaction in question.

In this context, information exchange can take various forms. Generally, information exchange constitutes (or forms part of) a horizontal competition agreement. In this case, for the information exchange to be relevant under the Cartel Act, it must take place between competitors (see Section I.2.A). Information exchange, however, can also take place in connection with a vertical competition agreement, particularly to facilitate the implementation of unlawful competition agreements (ancillary information exchange). Both forms of information exchange can be problematic under the Cartel Act (see below).

Moreover, the information does not have to be shared directly. Relevant information can either be shared directly between competitors or indirectly through a common agency (e.g. a trade association) or a third party, such as a market research organisation, or through the companies' suppliers or retailers. If information is shared indirectly, the information exchange might, at first glance, appear to be (part of) a vertical agreement, when in fact the end goal of the agreement is (horizontal) co-operation between competitors via information exchange. This type of information exchange is called *hub and spoke*.

1. Concerted Practice

Information exchange can constitute a concerted practice (and therefore a competition agreement) if it reduces strategic uncertainty in the market, thereby facilitating collusion, that is, if the information exchanged is of a strategic nature. Exchange of strategic information between competitors amounts to concertation, because it reduces the independence of competitors' market conduct and diminishes their incentives to compete.

Not only exchange but also one-sided disclosure of strategic information to competitors (who accept it) can constitute a concerted practice. In this context, it is irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of their respective intentions. When one undertaking alone reveals to its competitors strategic information, this reduces strategic uncertainty for all the competitors involved and increases the risks of limiting competition and collusive behaviour. For example, mere attendance at a meeting where a company discloses its pricing plans to its competitors will normally infringe competition law, even in the absence of an explicit agreement on prices. This practice is particularly relevant for trade associations, in the context of which, information is often exchanged in meetings between competitors.

When a company receives strategic information from a competitor (be it in a meeting or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such information. Therefore, not only sharing but also collecting price information is critical and must be conducted very carefully to be compliant with competition law.

2. Collusive Outcome

A. *Increase of Transparency*

By artificially increasing transparency in the market, the exchange of strategic information can facilitate coordination (i.e. alignment) of companies' competitive behaviour and result in restrictive effects on competition. This can occur by different means.

First, information exchange can create mutually consistent expectations regarding the uncertainties present in the market. On that basis, companies can then reach a common understanding on the terms of coordination of their competitive behaviour, even without an explicit agreement on coordination, which can lead to a collusive outcome on the market.

Second, information exchange can restrict competition by increasing the internal stability of a collusive outcome. Namely, information exchange can make the market sufficiently transparent to allow the colluding companies to monitor whether other companies are deviating from the collusive outcome. This can enable companies to achieve or maintain a collusive outcome on the market.

Third, information exchange can lead to restrictive effects on competition by increasing the external stability of a collusive outcome. Information exchange that makes the market

sufficiently transparent can allow colluding companies to monitor where and when other companies are attempting to enter the market, thus allowing the colluding companies to target the new entrant.

The competitive outcome of information exchange depends on the characteristics of the market in which it takes place as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination (see below).

B. *Market Characteristics*

In certain types of markets, companies can more easily reach a common understanding on the terms of coordination. The following market characteristics are relevant in this context:[2]

- *Transparency*: Collusive outcomes are more likely in transparent markets. Transparency can facilitate collusion by enabling companies to reach a common understanding on the terms of coordination and/or by increasing internal and external stability of collusion. Information exchange can increase transparency of the market and hence limit uncertainties about the strategic variables of competition. The lower the pre-existing level of transparency in the market, the more value an information exchange may have in achieving a collusive outcome and the more likely it will have restrictive effects on competition.
- *Concentration*: A collusive outcome is more likely to be sustainable with fewer companies. With more companies coordinating, the gains from deviating are greater because a larger market share can be gained through undercutting. At the same time, gains from the collusive outcome are smaller because the share of the rents from the collusive outcome declines when more companies are present. By increasing transparency or otherwise modifying the market environment, information exchanges may facilitate coordination and monitoring among more companies than would be possible in its absence.
- *Complexity*: Companies may find it difficult to achieve a collusive outcome in a complex market environment. However, to some extent, the use of information exchange may simplify such environments. In a complex market environment, more information normally has to be exchanged to reach a common understanding on the terms of coordination and to monitor deviations.
- *Stability*: Collusive outcomes are more likely where the demand and supply conditions are relatively stable, that is, when there is no volatile demand, no substantial growth, and no frequent entry by new companies. In an unstable environment, it may be difficult for a company to know whether its lost sales are due to an overall low level of demand or due to a competitor offering particularly low prices, and therefore it is difficult to sustain a collusive outcome. Information exchange can serve the purpose of increasing stability in the market, and thereby may enable or enhance a collusive outcome in the market.

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[2] See also the Guidelines of the European Commission regarding horizontal co-operation agreements (2011/C 11/01) (Horizontal Guidelines) para 77 et seq.; Alfonso Lamadrid De Pablo, 'The EU Commission issues new guidelines on the applicability of Art. 101 TFEU to horizontal co-operation agreements equating information exchanges between competitors with cartels, 14 January 2011', *e-Competitions* January 2011, Art N° 36405.

– *Symmetry*: A collusive outcome is more likely in symmetric market structures. When companies are homogenous in terms of their costs, demand, market shares, product range, capacities, or similar aspects, they are more likely to reach a common understanding on the terms of coordination because their incentives are more aligned. However, information exchange may also allow a collusive outcome to occur in more heterogeneous market structures by making companies aware of their differences and helping them to accommodate for their heterogeneity in the context of coordination.

In summary, companies are more likely to achieve a collusive outcome in markets that are *sufficiently transparent*, *concentrated*, *non-complex*, *stable* and *symmetric*. However, as outlined above, information exchange can also enable companies to achieve a collusive outcome in other market situations where they would not be able to do so in the absence of the information exchange. Information exchange can thereby facilitate a collusive outcome by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. Thus, the competitive outcome of an information exchange depends not only on the initial characteristics of the market in which it takes place, but also on how the type of the information exchanged may change those characteristics (see below).

C. *Type of Information*

Over the years, COMCO and the Federal Courts have established certain guidelines as to what types of information generally tend to modify the market to favour a collusive outcome and, therefore, lead to an infringement of competition law. The following criteria are relevant in this context:

– *Strategic information*: The exchange between competitors of strategic information (i.e. information that reduces strategic uncertainty in the market) is more likely to infringe competition law than exchanges of other types of information. Exchange of strategic information can give rise to restrictive effects on competition because it reduces the parties' decision-making independence by decreasing their incentives to compete. One if not the most relevant types of strategic information is information on current of future prices.
– *Market coverage*: For information exchange to be likely to have restrictive effects on competition, the companies involved in the exchange have to cover a sufficiently large part of the relevant market.
– *Aggregated / individualised information*: Exchanges of genuinely aggregated information, that is, where the recognition of individualised company level information is sufficiently difficult, are much less likely to lead to restrictive effects on competition than exchanges of company level information.
– *Age of information*: The exchange of historic information is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors' future conduct or to provide a common understanding on the market. However, it should be noted that the exchange not only of present but also of past information can, in principle, increase transparency on a market and therefore infringe competition law.
– *Frequency of the information exchange*: Frequent exchanges of information that facilitate both a better common understanding of the market and monitoring of deviations increase the risks of a collusive outcome. In more unstable markets,

more frequent exchanges of information may be necessary to facilitate a collusive outcome than in stable markets.

– *Public / non-public information*: In general, exchanges of genuinely public information are unlikely to constitute an infringement of competition law. Information is considered genuinely public if it is generally equally accessible (in terms of costs of access) to all competitors and customers, meaning that obtaining it should not be more costly for customers and companies unaffiliated to the exchange system than for the companies exchanging the information. This means that, even if the information exchanged between competitors is "in the public domain", it is not genuinely public if the costs involved in collecting the information deter other companies and customers from doing so. For example, to gather the information in the market (e.g. to collect it from customers) does not necessarily mean that such information constitutes market information readily accessible to competitors. In practice, competition authorities assume that competitors would normally not choose to exchange information that they can collect from the market at equal ease and that, therefore, in practice, exchanges of genuinely public information are unlikely. Consequently, competition authorities tend to assume that information exchanged by competitors is not genuinely public. In addition, it is important to note that, even if information is held to be publicly available information, the existence of an (additional) information exchange by competitors may give rise to restrictive effects on competition if it further reduces strategic uncertainty in the market.

III. Enforcement Policies and Practice

1. Authority in Charge of Enforcement

In Switzerland, COMCO and the Secretariat of the Competition Commission (Secretariat) have primary responsibility for enforcing the Cartel Act. COMCO is the deciding body, while the Secretariat conducts investigations and prepares the cases.

2. Relevant Procedures

The Secretariat can initiate preliminary investigations on its own discretion. If there are indications of an unlawful restraint of competition, it can open an in-depth investigation with the consent of one member of COMCO's presiding body. The Secretariat has wide investigative powers. It can collect information, for example by asking for statements, sending questionnaires to the parties concerned as well as to, for example, competitors, holding hearings, or conducting witness testimonies. The Secretariat can also conduct searches (dawn raids) or order the seizure of documents. These measures must be ordered by a member of COMCO's presiding body on application by the Secretariat.

Based on this information, the Secretariat then conducts its investigation. If the Secretariat concludes that the agreement or conduct in question constitutes an infringement of competition law, it will, as a rule, draft an order. The order is first submitted to the parties concerned for their comments. It is then brought forward to COMCO, together with

the statements of the parties concerned, for COMCO to decide. If there are substantial comments or statements by the parties concerned, the Secretariat can revise its draft order and resubmit it to the parties concerned (however, this rarely happens).

Before drafting an order to be submitted to the parties, the Secretariat can, on the initiative of the parties concerned or on its own initiative, propose settlement negotiations with the aim of concluding an amicable settlement. An amicable settlement is directed at future behaviour and does not exclude or limit sanctions for past behaviour that is the object of the investigation. However, an amicable settlement can be taken into account as a mitigating factor allowing for a reduction of the sanction (see below).

Based on the draft order and the statements by the parties concerned, COMCO reviews the case and usually holds hearings. COMCO may intervene and ask for further investigative measures. COMCO issues its decision on this basis, which may include amendments to the draft order brought forward by the Secretariat. In cases where an amicable settlement has been negotiated between the Secretariat and the parties concerned, COMCO must approve the amicable settlement as part of its decision.

There is no strict timetable for the investigation procedure. Preliminary investigations can take from two to several months, and in-depth investigations from roughly one year to two or three years, or even significantly more.

As outlined above (see I.2.A), the Cartel Act applies to competition agreements (agreements that *affect* competition). Consequently, for information exchange to be relevant under the Cartel Act, the information exchanged must be competitively sensitive information, meaning that it relates to relevant competition parameters, such as prices or market shares. Furthermore, the information exchange must either constitute a competition agreement or form part of such agreement. Thus, there must either be an explicit or non-explicit understanding between the involved undertakings or, more commonly, there must be a concerted practice with a restraint of competition as its object or effect. Information exchange (be it by all involved undertakings or just by one) is considered to constitute a concerted practice if it increases transparency in the market and, thus, facilitates collusion. This is assessed based on the characteristics of the market in which information exchange takes place on the one hand and on the properties of the information exchanged on the other (see II.3.B and C).

According to the (intended) scope of application of Article 4 paragraph 1 CartA, only behaviour that actually *causes* a collusive outcome by increasing transparency should be viewed as concerted practice and thus constitute a competition agreement (requirement of causality, *Kausalitätserfordernis*). However, it should be noted that COMCO as well as the Federal Courts tend to interpret Article 4 paragraph 1 CartA (too) broadly, meaning that, in practice, the exchange of competitively sensitive information will regularly be viewed as concerted practice (and therefore constitute a competition agreement), regardless of whether the information exchange actually caused any behavioural alignment of any relevant (counter-) party. In other words, authorities regularly imply that information exchange, which *could* have had a collusive effect, *had* a collusive effect, without actually addressing causality.

Once, in a first step, the existence of a competition agreement has been established, authorities will further, in a second step, examine if said competition agreement is

unlawful. It should be pointed out that, in practice, these two steps are not always clearly separated. This is unfortunate, since it tends to cause authorities to jump to the conclusion of competition law infringement by examining the unlawfulness of a conduct under Article 5 CartA before positively confirming (and proving) the existence of a competition agreement. In particular, this often happens if information about prices is concerned.

In case of (horizontal) cooperation between actual or potential competitors, authorities will first assess whether the information exchange relates to price fixing, limitation of quantities of goods or services, or market allocation geographically or according to trading partners. All these types of agreements (hardcore restrictions) are deemed to significantly restrict competition and therefore to be unlawful. The actual effects on competition of these agreements are *not* relevant and not assessed, nor is their implementation (see I.2.B). Consequently, these agreements will lead to sanctions unless they are justified on grounds of economic efficiency (which is, as mentioned, rarely possible). In conclusion, exchanging competitively sensitive information between competitors will, as a rule, be viewed as an unlawful agreement under the Cartel Act and be sanctioned. In some instances, information is not shared with or among competitors (neither directly not indirectly), but is rather shared (vertically) with undertakings at different levels of the production and distribution chain. Generally, this type of (ancillary) information exchange aims to facilitate the implementation of a competition agreement and is considered unlawful in particular if it relates to price fixing or territory allocation to the extent that sales by other distributors into those territories are not permitted.

If a competition agreement does not fall within the scope of Article 5 paragraphs 3 or 4 CartA (i.e. if it does not constitute a hardcore restriction), it may still be considered unlawful, if COMCO can prove that it significantly restricts competition within the scope of Article 5 paragraph 1 CartA. Most cases of information exchange that are investigated by COMCO relate to one of the parameters relevant under Article 5 paragraph 3 or 4 CartA (i.e. prices, territories, trading partners, or quantities of goods or services to be produced, purchased, or supplied). However, there can also be cases of information exchange that fall under Article 5 paragraph 1 CartA. No sanctions for first-time infringements can be imposed in cases that fall under Article 5 paragraph 1 CartA only (i.e. that are no hardcore restrictions under Article 5 paragraph 3 or 4 CartA).

IV. Applicable Sanctions and Exposure

1. Criteria and Procedure for Sanction Calculation

Undertakings that violate Article 5 paragraph 3 or 4 CartA can be sanctioned with a sanction of up to 10% of the turnover achieved in Switzerland in the preceding three financial years. The calculation of the maximum sanction amount is not limited to the relevant markets. In case of horizontal agreements the basic amount (the starting point for calculating the sanction) usually amounts to between 7% and 10% (but can be lower) and in case of vertical agreements usually amounts to 5% of the turnover achieved in the relevant markets affected by the infringement in Switzerland in the preceding three financial years.

When calculating the amount of a sanction, COMCO carries 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 CASO, if the infringement has lasted for between one and 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 cooperation other than in the form of a leniency application. Discount for a possible settlement is part of the discount for cooperation.
- *Step four:* COMCO deducts from the subtotal (resulting from the steps one to three) the discount (that is, the percentage applicable) granted to an undertaking for a leniency application.

With regard to the calculation of the discount, the following applies under the Explanatory Note on Amicable Settlements:

- *If no leniency application is made*: For the conclusion of a settlement without a leniency application (maximum 20%, depending on the stage of the proceeding) and for the cooperative conduct, in particular acknowledgement of the facts (maximum 20%), both discounts are added together, leading to a maximum discount of 40%.
- *If a leniency application is made*: For the conclusion of a settlement within a leniency application (maximum 20%, depending on the stage of the proceeding) and for the leniency application (maximum 50%, if going in second or later). There is no further discount for cooperative conduct because it is included in the discount for the leniency application. First, the discount for the settlement is applied and a subtotal is calculated. Second, the discount for the leniency application is applied, leading to a maximum discount of 60% (the maximum 20% and the maximum 50% are not added together).

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) can be sanctioned up to CHF 100,000 for wilful violations of 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 sanctioned up to CHF 20,000.

2. Immunity/Leniency

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. 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.

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

- provide information enabling COMCO to open an in-depth investigation according to 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 (Arts 26 and 27 CartA); or
- provide evidence enabling COMCO to establish the existence of a hardcore horizontal or vertical agreement, provided that no undertaking has already been granted conditional immunity from sanctions and that COMCO did not have, at the time of submission, sufficient evidence to establish the infringement of Swiss competition law.

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;
- cooperates 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.

An undertaking that submitted the leniency application after the first undertaking and/or that does not meet the conditions for full immunity can benefit from a sanction reduction of up to 50% if it has both cooperated on an unsolicited basis with the Secretariat and COMCO and ended its involvement in the infringement no later than when 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, the quality and the quantity of the information and evidence submitted.

An undertaking can benefit from a sanction reduction of up to 80% (amnesty plus) where both the undertaking provides information to the Secretariat and COMCO about other hardcore restrictions within the meaning of Article 5 paragraphs 3 and 4 CartA and the hardcore restrictions were unknown to the Secretariat and COMCO at the time of notification.

V. Safe Harbours and Exemptions

1. No General Safe Harbours in Switzerland

Different than, for example, in the European Union, there are no block exemptions in Switzerland. However, there are notices and other publications by COMCO and the Secretariat that set out and explain their practice and views. COMCO has issued a *de minimis* notice and a notice regarding vertical restraints and the corresponding explanatory note. There is, however, no notice that addresses horizontal restraints and information exchange in Switzerland. The Guidelines of the European Commission regarding horizontal cooperation agreements may be taken into account and used for guidance and interpretation purposes in Switzerland. However, it is important to note that COMCO does not apply EU law and therefore may not always apply the same competition law rules as in the European Union (see above).

2. Exemptions Related to the Properties of the Information Exchange

With regard to information exchange, the only relevant publication in Switzerland is the *de minimis* notice. There are no (other) notices that are relevant for (horizontal) information exchange. Agreements generally fall under this notice and are deemed to be lawful under Article 5 CartA if the following conditions are met (cumulatively):

- the agreement aims to improve competitiveness by realising economies of scale, contributing to innovation, or creating sales incentives (for example, agreements on production, financing and administration, research and development, advertising and marketing, and supply and distribution);
- the agreement has a limited effect on the market (which is presumed in case of horizontal agreements if the aggregate market share is below 10% or in case of vertical agreements if the market share of each party is below 15%); and
- the agreement does not include any hardcore restrictions according to Article 5 paragraphs 3 and 4 CartA.

In addition, the *de minimis* notice stipulates specific rules for very small undertakings. Agreements between very small undertakings generally fall under the exception of the *de minimis* notice, provided that the agreement does not include any hardcore restrictions according to Article 5 paragraphs 3 and 4 CartA. Very small undertakings are defined as having fewer than 10 employees and an annual turnover in Switzerland of under CHF 2 million.

With regard to *vertical* cooperation, the Notice Regarding Vertical Restraints is to be mentioned, in which COMCO defines types of vertical agreements that are deemed to have a qualitatively significant effect on competition and sets market share thresholds of 15% and 30%. However, hardcore restrictions are deemed to be principally qualified as significant restrictions on competition due to their quality (i.e. their object) and are de facto prohibited.

As mentioned, under Article 5 paragraph 2 CartA, agreements that are found to significantly affect competition can be justified on grounds of economic efficiency if:

- they are necessary to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
- they will not enable the parties involved to eliminate effective competition.

The list of grounds of economic efficiency in Article 5 paragraph 2 lit. a CartA is conclusive. The Federal Supreme Court stated that, for a competition agreement to be justified on the grounds of economic efficiency, it must be *necessary* to achieve economic efficiency, with no other option available that is less restrictive of competition. This poses a major obstacle and is in fact almost insurmountable, since, in practice, it will always be possible to imagine less far-reaching measures with which the same objective could (perhaps) have been achieved. There is therefore de facto a per se prohibition for horizontal and vertical hardcore restrictions under Article 5 paragraphs 3 and 4 CartA, as there is no realistic possibility of justification on grounds of economic efficiency.

3. Exemptions Related to Implementation and Exertion

Furthermore, no sanctions are imposed if the restraint of competition has not been exercised for more than five years by the time an investigation is opened (Art. 49a para. 2 litera b CartA). It is disputed whether agreements that were not formally nullified can be investigated and sanctioned even if they have not been implemented for more than five years (this has yet to be decided by COMCO and the courts). It should again be pointed out that, according to the *Gaba/Gebro* ruling of the Federal Supreme Court, the actual implementation of an agreement in the sense of Article 5 paragraphs 3 and 4 CartA (hardcore restrictions) is *not* required in order for authorities to impose sanctions.

It is also possible to notify an agreement or practice to obtain an individual exemption or other clearance. No sanction is imposed if the undertaking itself formally notifies the agreement or practice before it is implemented. COMCO has issued a filing form for this purpose. Nevertheless, a sanction can be imposed if the Secretariat communicates to the notifying undertaking the opening of a preliminary or in-depth investigation within five months from the notification of the agreement or practice, and the undertaking does not suspend the implementation of the agreement or practice in question. In practice, the formal notification of agreements or practices often does not lead to the required legal certainty and therefore should be carefully evaluated.

4. Information Exchange in Connection to M&A Transactions

In the context of M&A transactions, certain information naturally has to be shared, in particular during due diligence as well as during the integration phase, for the transaction to be feasible. This can be problematic under Article 5 CartA. In Switzerland, there are no specific laws or rules regarding information exchange for the purposes of conducting a merger or other concentration. However, over the years of practice of Swiss and foreign competition authorities (especially in the EU and the United States), certain rules and guidelines have emerged. Thus, information exchange will usually be deemed lawful in the context of a merger, if:

- the information shared is necessary for the analysis of the target company/business;
- the information is only disclosed under the protection of a confidentiality agreement (in practice, this is almost always done in any case);
- the disclosure of the information is contractually (and effectively) limited to the persons and to the extent necessary for conducting the transaction;
- the disclosure of information is contractually (and effectively) limited to persons that are not responsible in particular for marketing, pricing or sale of relevant competing products; in practice, this is done by putting in place so-called clean teams that include only persons without any of the above-mentioned responsibilities, and/or by outsourcing the review and analysis to external advisors;
- the return and/or destruction of relevant information and documents is ensured at the end of the merger process (especially if the merger was not consummated); and
- if possible, the parties must distinguish between different levels of sensitivity of the information and different stages of the transaction, that is, particularly sensitive information should only be disclosed in a later stage, for example after the initial bidding process has been completed.

VI. Information Sharing Best Practices

Undertakings need to make sure that their information gathering and sharing practice is compliant with competition law. As shown in this chapter, there are no exact rules on the admissibility of information exchange and it can, therefore, be difficult for undertakings to determine whether a certain information exchange practice is lawful. Consequently, it has become increasingly important for undertakings, especially for large company groups, to have their own competition law compliance guidelines in place to give industry – and company-specific guidance to employees and management. It is not possible to give general advice on what the exact content of such guidelines should be, as they must be tailored to meet the specific needs of the relevant industry and of the undertaking in question. However, there are certain core principles that such compliance guidelines need to adhere to and certain "must haves" that they need to include:

- Depending on the type of information, different rules must apply. The threshold and conditions for exchanging competitively (highly) sensitive information should be higher than for exchanging competitively less sensitive information. Undertakings must be particularly cautious if the information exchanged relates to prices, territories, trading partners, or quantities of goods or services to be produced, purchased, or supplied, since competition agreements relating to one or more of these parameters may be per se unlawful.
- As a rule, gathering (competitively sensitive) information from and/or sharing information with (actual or potential) competitors must be avoided.
- There should be a clear allocation of competences. Employees should always know exactly when and from whom they have to obtain approval before exchanging any information.
- As indicated above, one of the most important aspects of assuring functioning competition compliance in the long term is to regularly train employees of all levels (including top management) on the topic. Like the compliance guidelines themselves, the employee-training programme should be conducted in collaboration with competition lawyers and should be reviewed and updated on a regular basis.
- To ensure that the compliance system in place is actually adhered to, effective monitoring mechanisms should be in place (as they should be in any well-organized compliance system). This will enable undertakings to be aware of potential weaknesses of their compliance system and to identify employees who fail to comply with the relevant rules.
- Finally, it should be pointed out that, no matter how well thought through a compliance guideline or system is, it will not be effective, unless it is easy for all employees to understand and apply. Therefore, compliance guidelines as well as (regular) employee trainings need to be easy to understand, clearly structured, and concise. In practice, one of the best approaches is to create different checklists and offer different trainings for different types of employees (e.g. customise according to business area, position, function, country, contacts outside of the undertaking, suppliers and competitors, etc.).
- Relevant questions and issues to be included in checklists and trainings include:
  - Why am I exchanging certain information? Do I have a lawful reason for exchanging it?

- Who am I exchanging it with? Is it with a competitor or potential competitor?
- What am I exchanging? Is it competitively sensitive information?
- Do I need internal confirmation first for this type of information?
- How would it look in the press or on the news?

Arguably, the most important point to remember is to always stay alert. This means not only to implement and maintain a simple and effective information exchange compliance system, but also to continuously monitor information exchange and to constantly challenge the undertaking's approach toward information exchange as well as external and internal communication in general. In particular, undertakings should be cautious and potentially seek expert advice if, for example, an internal restructuring, an M&A transaction, or the conclusion of a new commercial relationship takes place, as this might result in new potential for competition law infringements by way of information exchange and/or call for changes to the internal compliance guidelines.

Information Exchange and Related Risks

A Jurisdictional Guide

Zoltán Marosi, Marcio Soares (eds.)

Foreword by Anthony M. Collins

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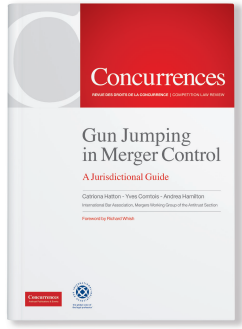

The prohibition on exchanging commercially sensitive information among competitors is one of the most fundamental antitrust rules. Companies and individuals may face potential exposure for anticompetitive information exchange, not only in their day-to-day business due to the applicable conduct and behavioral rules, but also in the context of M&A deals due to applicable gun jumping regulations. The Cartels Working Group of Antitrust Section of the International Bar Association has formulated a comparative guide across 28 jurisdictions, encompassing all global regions, to provide a compendium of best practices and key insights about leading cases, laws and regulations, as well as enforcement trends. Contributed by distinguished practitioners, each chapter provides an overview of the national competition rules and principles that guide information sharing in that jurisdiction, followed by the types of information sharing that may be caught, the enforcement policies and practices of the competition authority and applicable sanctions for parties that are found guilty of an illegal exchange of information. The book also provides a high level overview by the editors outlining trends observed across jurisdictions, to provide insight to the international business community, their advisors as well as to competition authorities.

The jurisdictions covered include Argentina, Australia, Brazil, Canada, Chile, China, Colombia, European Union, Finland, France, Germany, India, Israel, Italy, Japan, Mexico, Russia, Singapore, South Africa, South Korea, Spain, Sweden, Switzerland, The Netherlands, Turkey, Ukraine, United Kingdom, United States.

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