

International Comparative Legal Guides



Cartels & Leniency 2020

A practical cross-border insight into cartels & leniency

13th Edition

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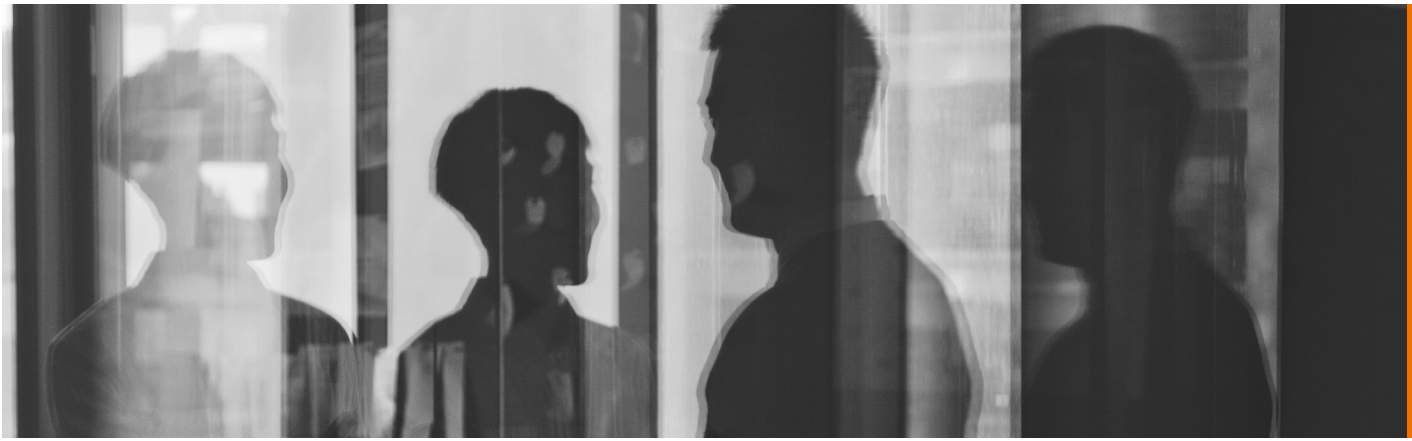
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Cartels & Leniency 2020

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This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Expert Chapters

- 1** **Cartel Updates: Recent Trends in Fine Calculations, Hybrid Settlement Procedures and Judicial Review at EU Level**
Elvira Aliende Rodriguez & Geert Goeteyn, Shearman & Sterling LLP
- 5** **Flexibility and Discretion in the EU Commission's Cartel Fines Calculation: Recent Decisions and Judgments**
Ingrid Vandenborre, Thorsten Goetz & Caroline Janssens, Skadden, Arps, Slate, Meagher & Flom LLP
- 11** **Disincentives to Leniency: Proposals to Revive the Golden Goose**
Frédéric Louis, Wilmer Cutler Pickering Hale and Dorr LLP

Country Q&A Chapters

- 17** **Australia**
Nyman Gibson Miralis: Dennis Miralis & Phillip Gibson
- 25** **Austria**
Preslmayr Rechtsanwälte OG: Dieter Hauck
- 32** **Bulgaria**
Popov, Arnaudov & Partners: Hristo Koparanov & Emiliyan Arnaudov
- 39** **Canada**
Cassels Brock & Blackwell LLP: W. Michael G. Osborne & Chris Hersh
- 46** **Chile**
Carey: Claudio Lizana & Carolina Veas
- 52** **China**
DeHeng Law Offices: Ding Liang
- 63** **European Union**
Shearman & Sterling LLP: Elvira Aliende Rodriguez & Geert Goeteyn
- 73** **Finland**
Borenius Attorneys Ltd: Ilkka Aalto-Setälä & Henrik Koivuniemi
- 80** **France**
Aramis: Aurélien Condomines & Pierre Galmiche
- 87** **Germany**
Shearman & Sterling LLP: Mathias Stöcker
- 95** **Hungary**
Bán, S. Szabó & Partners: Chrysta Bán & Álmos Papp
- 102** **India**
Cyril Amarchand Mangaldas: Avaantika Kakkar & Anshuman Sakle
- 110** **Indonesia**
ABNR Counsellors at Law: Chandrawati Dewi & Gustaaf Reerink
- 115** **Italy**
Shearman & Sterling LLP: Elvira Aliende Rodriguez & Agostino Bignardi
- 122** **Japan**
Nagashima Ohno & Tsunematsu: Yusuke Kaeriyama & Takayuki Nakata
- 128** **Luxembourg**
NautaDutilh Avocats Luxembourg: Vincent Wellens
- 134** **Malaysia**
Rahmat Lim & Partners: Azman bin Othman Luk & Penny Wong Sook Kuan
- 140** **Netherlands**
AKD: Joost Houdijk & Robbert Jaspers
- 146** **North Macedonia**
Debarliev Dameski & Kelesoska Attorneys at Law: Dragan Dameski & Jasmina Ilieva Jovanovik
- 154** **Portugal**
Morais Leitão, Galvão Teles, Soares da Silva & Associados: Luís do Nascimento Ferreira & Inês Gouveia
- 166** **Russia**
ALRUD Law Firm: Alla Azmukhanova & Daniil Lozovsky
- 172** **Slovakia**
URBAN FALATH GAŠPEREC BOŠANSKÝ: Ivan Gašperek & Ondrej Urban
- 179** **Spain**
King & Wood Mallesons: Ramón García-Gallardo & Pablo Vila Chirinos
- 194** **Sweden**
Hannes Snellman: Peter Forsberg & Johan Holmquist
- 200** **Switzerland**
Bär & Karrer Ltd.: Mani Reinert
- 206** **Turkey**
ELIG Gürkaynak Attorneys-at-Law: Gönenç Gürkaynak & Öznur İnanılır
- 215** **Ukraine**
Ilyashev & Partners: Oleksandr Fefelov & Haryk Matosian
- 223** **United Kingdom**
Shearman & Sterling LLP: Matthew Readings & Simon Thexton
- 231** **USA**
Paul, Weiss, Rifkind, Wharton & Garrison LLP: Charles F. (Rick) Rule & Joseph J. Bial



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From the Publisher

Dear Reader,

Welcome to the 13th edition of *The International Comparative Legal Guide to: Cartels & Leniency*, published by Global Legal Group.

This publication, which is also available at www.iclg.com, provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to cartels & leniency laws and regulations around the world.

This year, three general chapters cover trends, decisions and judgments in recent cartels cases.

The question and answer chapters, which cover 29 jurisdictions in this edition, provide detailed answers to common questions raised by professionals dealing with cartels & leniency laws and regulations.

As always, this publication has been written by leading cartels & leniency lawyers and industry specialists, to whom the editors and publishers are extremely grateful for their invaluable contributions.

Global Legal Group would also like to extend special thanks to contributing editors Geert Goeteyn, Matthew Readings and Elvira Aliende Rodriguez of Shearman & Sterling LLP for their leadership, support and expertise in bringing this project to fruition.

Rory Smith

Group Publisher

International Comparative Legal Guides

Switzerland

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Mani Reinert

1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal bases of the cartel prohibition are Article 4(1) and Article 5 of the Federal Act on Cartels and other Restraints of Competition (CA) of 6 October 1995, the equivalent to Article 101 TFEU. The basis for fines is Article 49a CA. The Ordinance on Sanctions imposed for Unlawful Restraints of Competition (CASO) of 12 March 2004 regulates details regarding the imposition of fines.

The legal nature of the Swiss cartel prohibition is civil.

1.2 What are the specific substantive provisions for the cartel prohibition?

Article 4(1) CA defines the notion of “arrangements affecting competition” as binding or non-binding agreements and concerted practices between undertakings operating at the same or at different levels of trade which have a restraint of competition as their object or effect. The Competition Commission (ComCo) has recently increasingly resorted to the notion of an “overall arrangement” to capture several infringements in one overall infringement. This notion resembles the notion of the single and continuous infringement of the European Commission; its contours are, however, less clear.

Article 5(3) CA presumes that arrangements between actual or potential competitors (a) to directly or indirectly fix prices, (b) to limit the quantities of goods or services to be produced, purchased or supplied, and/or (c) to allocate markets geographically or according to trading partners, eliminate effective competition.

Furthermore, Article 5(4) CA presumes that two kinds of vertical arrangements presumptively eliminate competition: (a) arrangements regarding fixed or minimum resale prices; and/or (b) arrangements regarding the restriction of passive sales.

The presumption of elimination of effective competition can be rebutted. However, according to the practice of the Federal Supreme Court, arrangements within the meaning of Article 5(3) or (4) CA are generally significant restrictions of competition. To be lawful, such arrangements need to be justified on grounds of economic efficiency. Arrangements are justified on grounds of economic efficiency if: (a) 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 (b) they will, under no circumstances, enable the parties involved to eliminate effective competition.

1.3 Who enforces the cartel prohibition?

The cartel prohibition is primarily enforced by ComCo and its Secretariat (the investigative body of ComCo). Civil courts may also enforce the cartel prohibition but they have no power to impose fines. ComCo’s decisions are subject to judicial review by the Federal Administrative Court and the Federal Supreme Court.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Some investigations are opened after the Secretariat has conducted a preliminary investigation. A preliminary investigation is a procedure in which the Secretariat investigates whether the case is worth being pursued in a formal investigation.

Investigations can be triggered as a result of leniency applications, whistleblowers (individuals), complaints of customers or competitors, press reports, through the Secretariat’s own market intelligence or through a chance find of ComCo in another investigation.

Many cartel investigations start with unannounced inspections and interrogations of the representatives of the undertakings subject to the investigation. Often, undertakings file for leniency as immunity is generally also available after an investigation has been opened.

Following the opening of the investigation, the Secretariat will review the evidence gathered, send out requests for information and/or interrogate further persons.

After having concluded the gathering and review of the evidence, the Secretariat drafts the so-called “motion” (which corresponds to the SO of the European Commission). With the motion, the Secretariat requests ComCo to discontinue the investigation, or to impose a fine or to approve a settlement with the parties, etc.

The parties can also negotiate a settlement with the Secretariat (see the answer to question 6.1).

Once drafted, the motion is circulated to the parties to the investigation for comments.

After having received the comments of the parties, the Secretariat decides on whether to conduct further investigative steps or whether to submit the motion to ComCo for decision. If the Secretariat deems the motion to be complete, it submits the motion to ComCo together with the comments of the parties. This is the latest point prior to which a party can request the Secretariat to conclude a settlement.

After the Secretariat has submitted its motion to ComCo, ComCo decides whether the case is ripe for decision or whether it has to be referred back to the Secretariat for further investigation. If ComCo deems the case ripe for decision, it conducts a hearing at which the parties can orally defend their case. After the hearing, ComCo decides on the case (or refers it back to the Secretariat for further investigation). ComCo then drafts the decision based on the motion of the Secretariat.

1.5 Are there any sector-specific offences or exemptions?

No. To the extent that the regulatory framework does not permit competition, that sector is exempted from the cartel prohibition.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

To fall under the jurisdiction of the CA, it is sufficient that the alleged conduct has potential effects in Switzerland. It is not necessary that such effects are direct, substantial or reasonably foreseeable.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory Power	Civil/ Administrative	Criminal
Order the production of specific documents or information	Yes ¹	N/A
Carry out compulsory interviews with individuals	Yes ¹	N/A
Carry out an unannounced search of business premises	Yes	N/A
Carry out an unannounced search of residential premises	Yes	N/A
■ Right to 'image' computer hard drives using forensic IT tools	Yes	N/A
■ Right to retain original documents	No ²	N/A
■ Right to require an explanation of documents or information supplied	Yes ¹	N/A
■ Right to secure premises overnight (e.g. by seal)	Yes	N/A

1. Undertakings enjoy the privilege against self-incrimination. See question 2.7.
2. In most cases this would be disproportionate.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

Unannounced inspections of the Secretariat require the approval of the president of ComCo and not of a court.

2.3 Are there general surveillance powers (e.g. bugging)?

No, there are none.

2.4 Are there any other significant powers of investigation?

There is a cooperation agreement in place between Switzerland and the European Commission which allows for the exchange of confidential information.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The Secretariat carries out unannounced searches. It is typically accompanied by the police and a neutral person (notary). The Secretariat does not wait for legal advisors to arrive.

2.6 Is in-house legal advice protected by the rules of privilege?

No, it is not.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Undertakings enjoy the privilege against self-incrimination (Article 6 ECHR). They may refuse to produce documents, to explain documents and to provide information relating to the alleged conduct. Arguably this privilege goes farther than the privilege against self-incrimination as interpreted by the European Court of Justice which considers that "purely factual" questions have to be answered. However, the Federal Administrative Court has held that undertakings would have a duty to provide turnover data that are the basis to calculate the fines.

As regards officers of any undertaking that is subject of the investigation, they cannot be compelled to incriminate the undertaking they represent. As regards retired officers of the undertaking, the Federal Administrative Court has held that answers to questions could not be compelled if they would directly incriminate the undertaking.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Yes. Obstruction of an investigation (beyond the privilege against self-incrimination) has been taken into account as an aggravating circumstance when calculating the fine. For example, the fines of undertakings that deleted or moved aside documents during an unannounced inspection, were increased by 10%. The authorities' approach has not changed in the last years.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The cap of the fine is 10% of the turnover the respective group, generated in the last three business years in Switzerland prior to the decision of ComCo.

The fine is calculated as follows:

The starting point for the fine is the basis amount. The basis amount is of up to 10% of the turnover generated in Switzerland in the relevant market during the last three business years before the end of the infringement. Hard core cartels are usually fined a basis rate of 7–10%. Unlawful resale price maintenance and the restriction of passive sales with 3–6%.

If the infringement lasted more than one year, this basis amount is then generally increased by 0.8333% for each month the infringement lasted.

This amount is then increased and/or reduced for aggravating/mitigating circumstances.

To this resulting amount, a potential leniency rebate is applied.

Furthermore, aside from ordering to bringing the infringement to an end, ComCo usually orders the parties to refrain from engaging in a conduct like the infringement in the future.

In case parties violate such order, ComCo can impose fines.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

There are no sanctions for individuals except if they violate an order of ComCo. Fines are up to CHF 100,000.

3.3 Can fines be reduced on the basis of ‘financial hardship’ or ‘inability to pay’ grounds? If so, by how much?

Yes. Fines can be imposed on the basis of “financial hardship” or “inability to pay” grounds based on the principle of proportionality. To benefit from such a reduction, the undertaking has to show that it would be likely to exit the market as a result of the fine.

3.4 What are the applicable limitation periods?

The limitation period is five years. This limitation period starts to run when “the restraint of competition has not been exercised anymore”. In case of a so-called overall infringement, ComCo is of the view that the five-year period starts when the overall infringement has come to an end. ComCo is of the view that it can impose a fine against any undertaking participating in the infringement as long as ComCo has opened the investigation against any undertaking participating in the infringement within the five-year period. This means that if ComCo opens an investigation against some members of a cartel within the five-year period but not against others, the latter cannot argue that a fine should be time-barred.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

This is not applicable; see question 3.2.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

In principle, an employee could be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer. In practice, however, it would be challenging to recover the full legal cost and financial penalties or even a fraction of it. Depending on the degree of negligence, courts may limit the liability to the amount of one monthly salary or a multiple of it. Furthermore, the employee may argue that the compliance programme (if any) was not robust enough, the infringement was tolerated by his/her superiors, etc.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

Yes. A parent company can be held jointly and severally liable for the cartel conduct of a subsidiary even if it is not itself involved in the cartel if it is capable of exerting a decisive influence over the subsidiary. The case law is not consistent as to what extent a buyer can be held liable for the conduct of the target that the target engaged in prior to its acquisition.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Immunity from a fine is granted if an undertaking reports its participation in a conduct within the meaning of Article 5(3) and/or (4) CA and if it is the first undertaking to: (a) provide information that enables ComCo to open an investigation; or (b) provide evidence that enables ComCo to establish an infringement within the meaning of Article 5(3) or (4) CA.

In addition, immunity is only granted if the applicant: (a) has not coerced any other undertaking into the infringement and has not played the instigating or leading role; (b) voluntarily submits all information and evidence relating to the infringement available to it; (c) continuously cooperates with the Secretariat/ComCo; and (d) ceases its participation in the infringement upon submitting the application or upon being requested to do by the Secretariat.

If ComCo has already opened an investigation, immunity is only granted if (a) no other undertaking already fulfils the requirements for immunity, and (b) the competition authority does not already possess sufficient evidence to prove the infringement.

An immunity application has to include the name and address of the applicant, a request for immunity, a declaration that the applicant engaged in an arrangement (concerted practice or agreement) and whether the arrangement had as its object or effect, a restriction of competition, a description of the conduct, its duration, the affected products and territories, as well as the names and addresses of the other undertakings and their contact persons.

An undertaking that is not entitled to full immunity can still be granted a reduction of up to 50% in case it voluntarily cooperates and terminates its participation in the infringement at the time of its application. The size of the rebate depends on the added value the undertaking provides. As there is no system of chairs, several undertakings can qualify for a 50% rebate in principle.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

There is a marker system. To obtain the marker, the applicant has to submit a form that includes the name and address of the applicant, a request for immunity, a declaration that the applicant engaged in an arrangement (concerted practice or agreement) and whether the arrangement had as its object or effect a restriction of competition, a description of the conduct, its duration, the affected products and territories, as well as the names and addresses of the other undertakings and their contact persons. Also, the applicant has to declare that it will fully cooperate with the Secretariat/ComCo.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Applications can be made orally.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The Secretariat keeps the identity of the leniency applicant confidential at least during the beginning of the investigation. Generally, the Secretariat will give access to any leniency application only when it circulates the motion.

ComCo and its Secretariat do not disclose leniency statements or pre-existing documents to private litigants.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

Any leniency applicant has to cooperate until the end of the investigation of ComCo, in case of a hybrid procedure, until the end of the contentious procedure.

Arguably, the requirement of continuous cooperation also applies after the end of the investigation, i.e. in case of an appeal.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There is a leniency plus programme. A leniency applicant that does not qualify for immunity can be granted a rebate of up to 80% if it provides information or submits evidence on another infringement within the meaning of Article 5(3) or (4) CA. In other words, such leniency applicant can get an 80% reduction for the cartel where it does not qualify for immunity and get immunity for the second cartel it reported as the first undertaking.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Whistleblowers can revert to designated contact persons at the Secretariat or use a special email address to report suspected infringements. ComCo will keep his/her identity confidential.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Parties can conclude a settlement with the Secretariat. The Secretariat then submits this settlement to ComCo for approval. ComCo remains free whether or not to approve such settlement but in practice regularly approves it.

There is no uniform process for settlement negotiations. However, negotiations typically involve the following steps:

The parties first sign the so-called framework rules. These rules state, among others, that both the undertaking and the Secretariat remain free to leave the negotiations at any time and that they will not use statements made by the other party in the negotiations in a subsequent potential appeal.

At the beginning of the negotiations, the Secretariat presents the undertaking its preliminary findings. The undertaking can then submit comments on these findings which the Secretariat will take into account. Later in the process, the Secretariat discloses the proposed fine. After each discussion, the Secretariat usually asks the undertaking to say whether it intends to remain in the negotiation process.

When the discussions reveal sufficient progress, the settlement agreement is negotiated. A settlement agreement has the following cornerstones: (a) the undertaking commits not to engage in a certain conduct in the future (anymore) – these behavioural commitments are often the subject of lengthy discussions as they apply for an indefinite duration and need to be clear and practically implementable; (b) the Secretariat declares (in a vague fashion) to issue a decision that is shorter than a contentious decision in an ordinary procedure; (c) the Secretariat commits to request ComCo to impose a fine of a certain range; and (d) the undertaking declares not to appeal the approval decision of ComCo, if ComCo approves the settlement and does not exceed the fine requested by the Secretariat. Unlike in the EU, the undertaking does not need to admit an infringement. However, if the undertaking admits the facts presented by the Secretariat, it can get a further reduction of the fine (up to 20%).

Unlike in other jurisdictions, an undertaking has to sign the settlement without knowing the exact description of the alleged conduct and its legal qualification in the motion. Consequently, the undertakings have to live with the risk of signing the settlement without knowing the exact content of the motion.

The reduction available for a settlement is 20%, 15% or 10% depending on how early in the process the settlement is concluded. If a settlement is concluded only after the motion has been sent to the undertaking, the reduction is *ca.* 5% only.

A settling party can still appeal the approval decision as the declaration not to appeal the approval decision of ComCo is not binding.

ComCo increasingly uses settlements to conclude cases. ComCo increasingly also goes into hybrid procedures, i.e. settles the case with only a part of the undertakings and concludes the investigation against the rest of the undertakings that did not settle in a contentious procedure.

7 Appeal Process

7.1 What is the appeal process?

Decisions of ComCo can be appealed at the Federal Administrative Court within 30 days of the decision. The Federal Administrative

Court has full jurisdiction to review the decision both on points of fact and law. It can cancel any fine or decrease it. It can also increase the fine but then has to notify the appealing party so it can withdraw the appeal.

Judgments of the Federal Administrative Court can be appealed at the Federal Supreme Court within 30 days on points of law.

7.2 Does an appeal suspend a company's requirement to pay the fine?

During an appeal at the Federal Administrative Court, the duty to pay the fine is suspended. In case of an appeal at the Federal Supreme Court, the appeal does not suspend a company's requirement to pay the fine.

7.3 Does the appeal process allow for the cross-examination of witnesses?

No. Witnesses are questioned by the court and not the appellants.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Plaintiffs may claim damages for loss suffered as a result of cartel conduct. To do so, plaintiffs essentially have to prove that they suffered a certain damage as a result of an unlawful arrangement. There is no specific legislation for "follow on" actions as opposed to "stand alone" actions. Follow-on actions may be partly easier to pursue given that a decision of ComCo establishes that there was an infringement. However, ComCo's decision is not binding for a civil court and will often not elaborate on the damage suffered.

8.2 Do your procedural rules allow for class-action or representative claims?

No, they do not.

8.3 What are the applicable limitation periods?

If the claim is based on tort law, the limitation period is three years from 1 January 2020 on. The three-year period starts when the plaintiff learns about the damage and the defendant responsible for it. Irrespective of this knowledge, damage claims get time-barred 10 years after the end of the infringement.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Yes. But the defendant has to prove the passing on.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The cost rules are the same as in other civil litigation. This means that the plaintiff has to pay the court fees and the fees of external counsel of the defendant if the plaintiff loses. The court fees depend on the dispute value and vary depending on the Canton in which the case is litigated.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

There are no publicly known follow-on claims that have been successfully litigated in court. So far, follow-on cases have been settled by the parties. Recently, the parties to an alleged construction bid rigging cartel settled the claims of the state that claimed to have suffered damage. As this settlement was concluded before ComCo handed down the decision on the fines, ComCo reduced the fines.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The government is discussing amendments of the Act on Cartels that should facilitate follow-on litigation. These include a suspension of the limitation period during the investigation of ComCo and subsequent appeals, a binding effect of ComCo's decisions for the civil courts, access to documents in the possession of the defendant or third parties (with the exception of leniency applications), as well as a reduction of fines due to civil settlements. So far, however, no concrete proposals have been published.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

There is a trend of ComCo for an analysis that disregards effects, and applies formal criteria following the so-called Gaba judgment of the Federal Supreme Court. In this judgment, the Federal Supreme Court held that arrangements falling under Article 5(3) and/or (4) CA would generally be significant restrictions of competition.



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Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Financial Services Disputes
Fintech
Foreign Direct Investments Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law

Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet Laws
Trade Marks
Vertical Agreements and Dominant Firms