

International **Comparative** Legal Guides



Practical cross-border insights into cartels & leniency

Cartels & Leniency **2022**

15th Edition

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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 Articles 4(1) and 5 of the Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (CA), the equivalent to Article 101 of the Treaty on the Functioning of the European Union. The basis for fines is Article 49a CA. The Ordinance on Sanctions imposed for Unlawful Restraints of Competition 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. Recently, the Competition Commission (ComCo) has 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, in order to 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 Articles 5(3) or (4) CA are generally significant restrictions of competition. To be lawful, such arrangements must 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 investigate 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 by 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 in dawn raids and/or leniency applications, send out requests for information and/or interrogate further persons.

After having concluded the review of the evidence, the Secretariat drafts the so-called “motion” (which corresponds to the Statement of Objections 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 (please see 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 whether to conduct further investigative steps or to submit the motion to ComCo for a 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 a decision or whether it must be referred back to the Secretariat for further investigation. If ComCo deems the case ripe for a 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 Please provide a summary of the general investigatory powers in your jurisdiction.

The Secretariat has the power to order the production of specific documents or information and the power to carry out compulsory interviews with individuals. However, these powers are limited by the privilege against self-incrimination (Article 6 of the European Convention on Human Rights (ECHR)); please see question 2.7.

The Secretariat can also carry out an unannounced search of business and residential premises. The Secretariat has the right to secure premises overnight (e.g. by seal). The Secretariat claims the right to “image” computer hard drives using forensic IT tools (i.e. not only those parts of the file that relate to the investigation). In most cases, it will be regarded as disproportionate to retain the original documents. The Secretariat also has (within the limits of the privilege against self-incrimination) the right to require an explanation of the documents or information supplied.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

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)?

There are no general surveillance powers.

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, in-house legal advice is not protected by the rules of privilege.

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, explain documents and/or provide information relating to the alleged conduct. Arguably, this privilege goes further than the privilege against self-incrimination as interpreted by the European Court of Justice, which considers that “purely factual” questions must be answered. However, the Federal Administrative Court has held that undertakings would have a duty to provide turnover data which are the basis to calculate the fines.

The same is true for members of the formal or factual body of the company. Members of the formal or factual body of the company cannot be compelled to incriminate the undertaking which they represent. With regard to other employees and former (e.g. retired) officers, they can be interrogated as witnesses and can be compelled to incriminate the undertaking which they are or were working for.

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 recent years. In addition, an obstruction of an inspection can be subject to criminal sanctions.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The cap of the fine is 10% of the turnover of the respective group generated in Switzerland in the last three business years 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 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. Hardcore cartels are usually fined with a basis rate of 6–10%. Unlawful resale price maintenance and the restriction of passive sales are usually fined with a basis rate of 3–6%.

- If the infringement lasted more than one year, this basis amount is 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 the parties to bring the infringement to an end, ComCo usually orders the parties to refrain from engaging in conduct like the infringement in the future.
- In the case that the 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 unless 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 reduced on the basis of "financial hardship" or "inability to pay" grounds based on the principle of proportionality. In order to benefit from such a reduction, the undertaking must demonstrate 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 the 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, provided 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; please 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 theory, 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 costs and financial penalties or even a fraction of them. Depending on the degree of negligence, courts may limit the liability to the amount of one monthly salary or a multiple of this. 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 conduct within the meaning of Articles 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 Articles 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 so 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 must 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 the case that 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 which 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. In order to obtain the marker, the applicant must 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. In addition, the applicant must 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 at the latest 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 must cooperate until the end of the investigation of ComCo; in the case of a hybrid procedure, the applicant must cooperate until the end of the contentious procedure.

Arguably, the requirement of continuous cooperation also applies after the end of the investigation, i.e. in the 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 Articles 5(3) or (4) CA. In other words, such leniency applicant can obtain an 80% reduction for the cartel where it does not qualify for immunity, and obtain immunity for the second cartel that 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 to the extent possible.

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 as to whether 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 its preliminary findings to the undertaking. The undertaking can then usually 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 must 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 that it will not 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 obtain a further reduction of the fine (up to 20%).

Unlike in other jurisdictions, an undertaking must sign the settlement without knowing the exact description of the alleged conduct and its legal qualification in the motion. Consequently, the undertakings must 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. Moreover, ComCo has gone into hybrid procedures, i.e. settles the case with only some 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 are able to 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 must 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 the 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 must 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. The three-year period starts when the plaintiff learns about the damage and the defendant responsible for it. Irrespective of this knowledge, damage claims are 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; however, the defendant must 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 must 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 CA 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.

The government has also published a proposal for an amendment of the general procedural rules. Among others, the advances on court fees shall be halved and parties shall no longer be liable for court fees of the other insolvent party.

The introduction of instruments of collective redress is discussed in Switzerland. However, given the strong political opposition, the success of this project is uncertain.

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

There is a trend at 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 Articles 5(3) and/or (4) CA would generally be significant restrictions of competition.


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