Switzerland

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BACKGROUND

1. What is the relevant legislation containing the leniency policy and what is the enforcing body?

The relevant legislation in Switzerland is the Federal Act on Cartels and other Restraints of Competition of 6 October 1995 ('ACart'). Despite substantial improvements to the substantive and procedural rules, the enforcement instruments under the 1995 Act were not sufficiently effective. In particular, when both the United States and the European Commission imposed substantial fines after the vitamins cartel was discovered, Switzerland, due to the lack of fines in the case of first-time infringements of competition rules, could not impose fines against the companies involved in the vitamins cartel in Switzerland. This situation triggered an additional amendment to the Act on Cartels in 2003 which came into force on 1 April 2004. This amendment introduced the Competition Commission's power to order substantial fines against first-time infringements of the most important substantive rules and a leniency system.

Unlawful agreements are subject to the provisions of Article 5 ACart. In terms of the intensity of the restraint of competition, three types of unlawful agreements are to be distinguished:

- agreements that do not significantly affect competition – such agreements are lawful;
- agreements that significantly affect competition – such agreements may be justified on grounds of economic efficiency; and
- agreements which eliminate effective competition – such agreements are unlawful.

Article 5(3) and (4) ACart define types of agreements which are presumed to lead to the elimination of effective competition. Only these types of agreements, apart from illegal practices by market-dominant enterprises (Article 7 ACart), can be directly sanctioned according to Article 49a(1) ACart. The maximum fine may amount to up to ten per cent of the turnover achieved in Switzerland during the last three business years. The amount shall be calculated based on the duration and severity of the illegal conduct and the presumed profit resulting from it shall be duly taken into account (Article 49a(1) ACart).

Under Article 5(3) ACart the following horizontal agreements among actual or potential competitors are presumed to lead to the elimination of effective competition:

- agreements directly or indirectly fixing prices;
- agreements restricting the quantities of goods or services to be produced, bought or supplied;
- agreements allocating markets geographically or according to trading partners.

According to Article 5(4) ACart, agreements between undertakings on different market levels (ie vertical agreements) regarding minimum or fixed prices as well as clauses in distribution agreements regarding the allocation of territories, provided distributors from other territories are prohibited from sales into these territories, are presumed to eliminate effective competition. The latter provision regarding exclusive distributorship agreements may only be understood in the context of the debate in the Swiss Parliament. Prior to the 2003 Amendment, there had been much political and public debate regarding price levels in Switzerland, quite often referred to as a 'high-price island' within Europe. The reason for

these allegedly high prices has been attributed, among others, to certain vertical restraints. Although no precedents exist so far, the rules' objective in Article 5(4) is widely held to declare unlawful prohibitions of passive sales into exclusive territories.

An enterprise that acts illegally according to Article 7 ACart can also be fined according to Article 49a(1) ACart. Article 7(1) ACart provides that practices of undertakings having a dominant position are deemed unlawful when such undertakings, through the abuse of their position, prevent other undertakings from entering or competing in the market, or when they injure trading partners. As a consequence, under this provision both the abuse of dominance against competitors and against down-stream or up-stream trading partners may be unlawful. This is further confirmed by a list of examples of such abuses in Article 7(2) ACart which includes refusals to deal, discrimination between trading partners, the imposition of unfair prices or conditions, predatory pricing, restrictions of production, outlets or technical developments or tying. The definition of abuses of dominant positions is very similar to the one in Article 82 EC. As in other jurisdictions, conduct of dominant enterprises may be justified on the basis of legitimate business reasons. If the conduct of a dominant undertaking is held to be unlawful, it is subject to first-time infringement fines based on Article 49a(1) ACart.

The 2003 Amendment also introduced a clear legal basis for coercive measures in connection with investigations by the competition authorities and a leniency programme. According to Article 49a(2) ACart, the sanction may be waived, in whole or in part, if the enterprise cooperates in uncovering and eliminating the restraint of competition. The conditions and the procedure for full or partial exemption from sanctions under Article 49a(2) ACart are contained in the Ordinance on Sanctions regarding illegal restraints of competition of 12 March 2004 ('OS ACart'). In addition, this Ordinance contains provisions regarding the rules for the calculation of fines.

In Switzerland, apart from private enforcement before civil courts, only federal administrative bodies (the Competition Commission and its Secretariat) have power to implement the Act on Cartels. The main administrative body enforcing the Act on Cartels is the Competition Commission which is elected by the Federal Government (Article 18(1) ACart). The Competition Commission is composed of between 11 and 15 members. Its majority has to consist of so-called independent experts who are usually either legal or economic scholars (Article 18(2) ACart). The remaining members of the Competition Commission are usually recruited from among the leading members of trade associations, unions, consumer groups, representatives of retailers and of agricultural production associations. The Competition Commission is independent of the Federal Government (Article 19(1) ACart). It is divided into three chambers which have individual power to issue decisions (cf Article 19 to 21 ACart). There is a chamber for product markets, one for services and one for infrastructure. Each chamber is chaired by a Chairman, who are respectively Chairman or Vice Chairmen of the Competition Commission. For administrative purposes, the Competition Commission is attached to the Federal Department of Economic Affairs. The Competition Commission is the sole administrative body having power to issue decisions prohibiting certain conduct, agreements or concentrations of undertakings. It is also the only administrative body having power to impose fines and to grant leniency (Article 53(1) ACart).

The Secretariat of the Competition Commission conducts investigations and preliminary investigations and prepares the Competition Commission's decisions (Article 23(1) ACart). The Secretariat has no power to open investigations by itself, rather it may only do so with the consent of a member of the presiding body of the Competition Commission (Article 27(1) ACart). Equally, procedural decisions must be issued by a member of the presiding body of the Competition Commission (Article 23(1) ACart). The Competition Commission's Secretariat consists of over 50 professionals (lawyers and economists) and is divided, similarly to the Competition Commission, into three services (product markets, services, and infrastructure). In addition, the Secretariat consists of six competence centres (law,

economics, internal market, international affairs, communications, and investigations). The Secretariat is led by an Executive Management Board consisting of a Director, a Deputy Director, two Vice Directors, and the Head of Resources and Logistics (cf *www.weko.admin.ch.sekretariat*).

Decisions rendered by the Competition Commission, including decisions on leniency, are subject to an appeal to the Federal Court for Administrative Matters (Article 33 lit. f Act on the Court for Administrative Matters in conjunction with Article 39 ACart). Its decisions may be subject to an administrative appeal to the Federal Supreme Court (Article 86(12)(a) of the Federal Act on the Federal Court).

2. What are the basic tenets of a leniency/immunity programme?

The leniency rules were introduced by the 2003 Amendment to the Act on Cartels, although there initially was strong opposition in Parliament to this regime because it allegedly puts a premium on denunciations, contrary to Swiss legal traditions. According to Article 49a(2) ACart, an enterprise taking part in the disclosure and removal of a restraint of competition may benefit from a full or partial waiver of fines.

The Ordinance on Sanctions specifies that full waivers are available to first-movers only, for information leading to the opening of an investigation based on Article 5(3) or(4) ACart or for submitting evidence permitting the discovery of a violation of these provisions (Article 8 OS ACart – see question 8 for all prerequisites). The provisions referred to define the types of horizontal and vertical agreements which are presumed to lead to the elimination of effective competition (see question 1 for further details).

Partial waivers of fines are available to enterprises participating voluntarily in an investigation and who, at the time the evidence is presented, have ceased their participation in the anti-competitive practice. The reduction may amount to a maximum of 50 per cent. It is determined based on the role played by the enterprise in the success of the proceeding (Article 12(2) OS ACart). If additional infringements of Article 5(3) or (4) ACart are discovered on the basis of its participation, the reduction can be up to 80 per cent of the amount calculated according to Articles 3–7 OS ACart if an enterprise submits, on an unsolicited basis, information or evidence on these additional anti-competitive practices (Article 12(3) OS ACart). Leniency applications may be made orally and anonymously (Article 9 OS ACart).

The calculation of the sanction shall be based on the duration and severity of the illegal conduct. The presumed profit resulting from the illegal conduct shall be duly taken into account (Article 2 OS ACart). Depending on the severity and type of violation, the base amount of the sanction shall be up to 10 per cent of the turnover which the enterprise concerned achieved in the relevant markets in Switzerland during the last three business years (Article 3 OS ACart). This base amount can be increased by up to 50 per cent if the competition violation lasted between one and five years. If the violation lasted more than five years, the base amount shall be increased by up to 10 per cent for each additional year (Article 4 OS ACart).

In the case of aggravating circumstances, the base amount can be increased. This is particularly the case if the enterprise has repeatedly violated the Cartel Act, has achieved a particularly high profit through a violation or has refused to cooperate with the authorities or has otherwise attempted to obstruct the investigation (Article 5(1) OS ACart). In cases of restraints of competition according to Article 5(3) and (4) ACart, the amount can be additionally increased if the enterprise has instigated the restraint of competition or played a leading role in connection with it, or, in order to enforce the understanding affecting competition, has ordered or carried out retaliatory measures against others involved in the restraint of competition (Article 5(2) OS ACart).

In the case of extenuating circumstances, the base amount can be reduced. This is particularly the case if the enterprise has terminated the restraint of competition after the first

intervention by the Competition Commission's Secretariat, but no later than prior to the opening of proceedings (Article 6(1) OS ACart). In the case of a restraint of competition according to Article 5(3) and (4) ACart, the base amount can be reduced if the enterprise has only played a passive role or has not carried out retaliatory measures agreed upon in order to enforce the understanding affecting competition (Article 6(2) OS ACart).

3. How many cartels have been unveiled and punished since the adoption of the leniency policy?

Up to April 2007, no cartels have been punished since the adoption of the leniency policy. This is mainly due to the fact that the Revised Act on Cartels which came into effect on 1 April 2004 contained a transitional provision according to which no fine could be levied if an existent restriction of competition was notified to the authorities or cancelled within a year following the enactment of Article 49a ACart. This grace period ended only on 31 March 2005 so that an application for leniency only made sense after that date.

An investigation of alleged territory allocations regarding public tenders for road pavings in Ticino was closed by the Secretariat in January 2007 with a motion to the Competition Commission to render a decision stating that there had been illegal restraints of competition in the sense of Article 5 ACart. However, since these restraints of competition had been terminated prior to the end of the grace period on 1 April 2005, the addressees of the decision yet to be made cannot be fined.

On 14 February 2006, the Secretariat of the Competition Commission conducted its first dawn raid in a concerted action with other competition authorities worldwide. The house search concerned alleged illegal restraints of competition within the air cargo industry, particularly regarding fuel surcharges. The investigation is still ongoing. Therefore, there has not been any punishment to date, ie April 2007. It is unclear how long the investigation is going to take and whether or not there will be fines at the end of the day.

There are certain indications for pending leniency applications, but nothing has transpired to the public so far. The staff of the Secretariat has declared that it is very satisfied with its first ever dawn raid and that its notice on dawn raids has proven its practicability.

4. What is needed to be a successful leniency applicant? Is documentary evidence required or is testimonial evidence sufficient?

The kind of evidence that is needed for a successful leniency application is dependent on the information and evidence the Competition Commission already has at the time of the application. For a full waiver of fines, therefore, one of the following requirements must be met:

- If the competition authorities have no previous knowledge of the restraint of competition, the enterprise seeking leniency should deliver information which enables the competition authorities to open an investigation under Article 27 ACart (Article 8(1) OS ACart). The waiver of the sanction, however, shall in this case only be granted if the competition authority does not already have information sufficient to open a proceeding regarding the restraint of competition (Article 8(3) OS ACart).
- If the competition authorities already have knowledge of the restraint of competition, the enterprise seeking leniency should submit evidence which enables the competition authorities to establish a competition violation under Article 5(3) or (4) ACart. The waiver of the sanction in this case shall only be granted if no other enterprise already fulfills the prerequisites for a waiver according to Article 8(1) OS ACart and the competition authority does not already have evidence sufficient to prove the anti-competitive practice (Article 8(4) OS ACart).

Oral information may thus be sufficient if it brings the competition restriction to the competition authority's attention (cf Article 9(1) OS ACart according to which the self-denunciation can also be stated orally for the record). If the competition authority is already

aware of the reported infringement, the submission of documentary evidence, or witness testimony is needed for a successful leniency applicant, provided that no other enterprise has previously cooperated with the competition authority.

TIMING

5. What are the benefits of being 'first in' to cooperate?

The benefits of being 'first in' to cooperate are a full waiver of the sanction provided that all prerequisites for that are fulfilled (for further details see question 8).

Self-denunciation is a decisive point for obtaining a full waiver of the sanction and should contain the necessary information regarding the notifying enterprise, the type of anti-competitive practice notified, the enterprises participating in such practice and the relevant markets affected. The self-denunciation may also be stated orally for the record (Article 9(1) OS ACart). The enterprise may even submit the self-denunciation by presenting the information in anonymous form (Article 9(2) OS ACart). This is designed as a safeguard in order to prevent possible retaliatory measures from other enterprises involved in the anti-competitive practice. The Secretariat can define the modalities of the self-denunciation on a case-by-case basis with the consent of a member of the governing board of the Competition Commission (Article 9(2) OS ACart). As general guidance, the Secretariat has issued an application form that is available (also in English) on its website (see question 10).

Since time is of the essence for leniency applications, the Secretariat shall confirm receipt of the self-denunciation, including the date and time of receipt. It shall communicate to the notifying enterprise, with the consent of a member of the governing board, as to:

- whether it considers the prerequisites for a complete waiver of the sanction according to Article 8(1) OS ACart to be fulfilled; however, a leniency applicant should take into consideration that this communication may contain an important caveat, ie that a complete waiver is subject to the condition that the applicant has neither forced any other enterprise to participate in the alleged cartel nor played an instigating or leading role in it.
- the additional information the notifying enterprise should submit, in particular in order to fulfil the prerequisites according to Article 8(1) OS ACart; and
- in the case of an anonymous self-denunciation, the time period within which the enterprise should disclose its identity (see Article 9(3) OS ACart).

In the case of multiple self-denunciations, the competition authority shall examine subsequent self-denunciations only upon having decided according to Article 9(3) OS ACart on the earlier self-denunciations (Article 10 OS ACart). The Competition Commission decides on the full waiver of the sanction. It may only deviate from a communication of the Secretariat according to Article 9(3)(a) OS ACart if it subsequently becomes aware of facts preventing the waiver of the sanction (Article 11 OS ACart). A considerable drawback for leniency applicants is the fact that only at the very end of the proceedings will the ultimate decision on a full waiver of the fine be made. Until then, there is quite a long period of uncertainty without any full guarantee from the competition authority.

6. What are the consequences of being 'second'? Is there an 'immunity plus' or 'amnesty plus' option?

As set out under question 5, the full exemption from sanctions can only be granted to one single enterprise, the one who first reports to the authorities. When another enterprise meets the requirements stated in Articles 8 and 9 OS ACart but does not qualify for full exemption due to the lack of priority in the timing or for other reasons, it can still benefit from a reduction of the fine in the context of partial exemption provisions.

The Competition Commission can reduce the sanction if an enterprise has participated on an unsolicited basis in a proceeding, and, at the time the evidence is presented, has ceased participation in the anti-competitive practice (Article 12(1) OS ACart). The fine can be

reduced by up to 50 per cent, depending on the extent to which the enterprise contributes to the success of the procedure (Article 12(2) OS ACart). The reduction may even be up to 80 per cent of the amount of the sanction when an enterprise provides information or evidence on an unsolicited basis regarding further competition violations pursuant to Article 5(3) or (4) ACart (Article 12(3) OS ACart).

The enterprise seeking a partial exemption from sanctions has to contact the Secretariat of the Swiss Competition Commission and submit the necessary information regarding the denouncing enterprise, the type of anti-competitive practice denounced, the enterprises participating in such practice, and the relevant markets affected. The Secretariat shall confirm receipt of the evidence, including the date and time of receipt (Article 13 OS ACart). It is the Competition Commission which will decide on the size of the reduction granted to the cooperating enterprise. Should the cooperating enterprise submit to the Competition Commission evidence on the duration of the anti-competitive practice of which the Commission was unaware until then, the latter shall calculate the sanction without taking this time period into consideration (Article 14 OS ACart).

7. Are subsequent firms given any beneficial treatment if they make a useful contribution? How are 'useful contributions' defined?

The reduction of the sanction is not an option that is limited to the second enterprise to cooperate with the Competition Commission. As long as the enterprise concerned participates on an unsolicited basis in a proceeding and has ceased participation in the anti-competitive practice when starting the cooperation with the authority, the benefit of a reduced sanction can be granted. Of course, the more participants of an anti-competitive practice that are cooperating with the Competition Commission, the more difficult it will get to play a substantial role in the success of the proceeding (cf Article 12(2) OS ACart). This is why it might be difficult to reach the same level of reduction as a previous cooperating enterprise. At the same time, however, if a subsequent firm voluntarily submits information or evidence on further anti-competitive practices, the option of a reduction up to 80 per cent of the amount of the sanction would be fully available to this enterprise coming forward later than the other participants (cf Article 12(3) OS ACart). The 'useful contributions' may thus be defined along the lines of whether they enable the Competition Commission to better prove the illegal behaviour already under scrutiny or to start a new investigation.

SCOPE/FULL LENIENCY

8. Is it possible to receive full leniency? And, if so, what are the conditions required to receive full leniency?

A full exemption from sanctions is possible. As already set out in question 4, a full waiver of the sanction is possible if the enterprise notifies its participation in an unlawful restraint of competition and is the first to provide information enabling the Competition Commission to open a proceeding or is first to submit evidence enabling the Competition Commission to discover an illegal restraint of competition according to Article 5(3) and (4) ACart (Article 8(1) OS ACart).

In both cases, the following further requirements must be cumulatively satisfied (Article 8(2) OS ACart). The enterprise:

- should not have forced any other enterprise to participate in the violation of competition and should not have played the instigating or leading role therein;
- should submit to the Competition Commission on an unsolicited basis all information and evidence concerning the violation of competition in its possession;
- should cooperate continuously, unreservedly and without delay with the competition authority during the entire duration of the proceeding; and
- should cease its participation in the violation of competition no later than at the time of its self-denunciation or upon first order by the competition authority.

Moreover, the waiver of the sanction is not possible if the competition authority already has information sufficient to open an investigation regarding the restraint of competition according to Articles 26 and 27 ACart (Article 8(1)(3) OS ACart) or has already sufficient evidence to prove the anti-competitive practice (Article 8(1)(4) OS ACart). However, the staff of the Secretariat made it clear that it is not impossible for a company to receive full leniency even in case the leniency application is filed only at the time of a dawn raid. Whereas it is excluded by the very fact of the dawn raid to provide information enabling the Competition Commission to open a proceeding, it is still possible to submit evidence enabling the authority to prove an illegal restraint of competition, unless the authority has already sufficient evidence. The company being dawn raided may still opt to provide suitable evidence voluntarily and unsolicitedly. Since a company is only obliged to endure the house search, but not forced to actively support it, the company representatives do have the possibility to apply for full leniency during a dawn raid and to offer full cooperation with the authorities. Even if a full leniency is excluded because there has been a previous applicant, the voluntary handing over of evidence may lead to a reduction of the fine (see answers to questions 6 and 7).

It is evident from the above list of prerequisites, which have to be cumulatively fulfilled, that it might be difficult for an enterprise to know whether or not it could be barred from being qualified for full leniency. An 'instigating' or 'leading' role may well be debatable depending on the specific circumstances. In case of serious doubts in that respect, it may be advisable for an enterprise to abstain from applying for leniency, at least if a full waiver of the sanction is the goal of the application. In addition, the prerequisite not to have played an instigating or leading role may serve as a disincentive to apply for leniency after management changes or acquisitions which often lead to the internal disclosure of anticompetitive conduct. Moreover, the whole catalogue of prerequisites could also be seen as quite a powerful tool in the hands of the Competition Commission. An enterprise ready and willing to cooperate may thus find itself in a considerably dependent position afterwards.

This delicate situation is tightened by the fact that members of the Secretariat have publicly stated that appealing against a dawn raid or a sequestration may put at risk the bonus of the leniency application. The Secretariat takes the position that the duty of continuous and unreserved cooperation without delay can hardly be reconciled with raising a complaint or bringing an appeal against investigation measures. This highly controversial view raises serious concerns as to its legitimacy. Companies may thus be prevented from, or at least intimidated not to, having recourse to legal remedies even in cases where the competition authority may have overstepped its competence or may have clearly violated the law meant to protect legitimate interests of the company concerned.

9. How many companies have received full immunity from fines to date?

At the time of writing, no company has received full immunity from fines. Several leniency applications seem to have been made since the grace period ended on 31 March 2005 (see question 3).

PROCEDURE/CONFIDENTIALITY

10. What are the practical steps required to apply for leniency?

The Competition Commission provides on its website (*www.weko.admin.ch*) a leniency application form in which it summarises the necessary information for filing an application (setting out in more detail the information indicated in Article 9(1) and Article 13 OS ACart). The headings in the form mention the enterprise seeking leniency, the type of the restraint of competition, the enterprises who participated in the restraint of competition, a description of the affected markets and the evidence to be submitted. The application form is also available in English (*www.weko.admin.ch/imperia/md/images/weko/67.pdf*).

The Competition Commission advises that leniency applications should be made to the Secretariat by sending the form by fax, by hand delivery, or by submitting it orally for the record. The reason for this is that it could be difficult for the Secretariat to determine the exact order of receipt of applications sent by post. Applications which are sent by e-mail or made by phone will not be considered as having been validly filed. The application must be filed at:

Secretariat Swiss Competition Commission
Monbijoustrasse 43
CH – 3003 Bern
Fax: +41 31 322 20 53

For the sake of clarification, the Competition Commission expressly notes that a leniency application can only be filed individually, ie, by one enterprise alone and/or its representative, and not by two or several enterprises jointly.

Particular attention should be paid to the necessary procedural safeguards when making a leniency application. Due to the fact that access to the file can be easily granted in Switzerland to interested third parties, the file of the leniency submission should be kept strictly separate from the official file related to the investigation. The Competition Commission is well aware of the problem and acknowledges the need for a separate, confidential file with a different file number. Any documents, other evidence and corporate leniency statements should be submitted exclusively to this confidential leniency file.

Should there be the opening of an investigation, eg based on the submitted evidence, the question will come up as to which parts of the leniency file, and in which form, may go into the investigation file. There are indications that the Competition Commission is open to a fruitful and pragmatic discussion with leniency applicants regarding how to proceed in practice. As a rule of thumb, it would like to use the relevant documents as such but is willing to use them only in aggregated or anonymous form if this can be justified by the leniency applicant.

As to corporate leniency statements, it is highly recommended to make them orally and have them recorded by the Competition Commission. Otherwise, the corporate leniency statement might be subject to pre-trial discovery in civil litigation cases in the United States of America (class actions are quite common in cases of alleged hard-core cartels). An oral statement of which minutes are taken at the Competition Commission's premises may be regarded as an internal agency document and hence not discoverable.

11. Is there an optimal time to approach the regulatory authority?

The optimal time to approach the Secretariat of the Competition Commission may vary depending on the respective restraint of competition. As a general rule, however, one may argue the sooner the better. Since only the first one who knocks at the door of the Competition Commission will benefit from a full exemption from sanctions, it is recommended to come forward as soon as possible. Otherwise, the Competition Commission might get to know of the illegal restraint of competition from other participants or through its own investigations. If this is the case, a full waiver will no longer be available. In multi-jurisdictional cases, a coordination of the Swiss leniency application with applications submitted in other countries is advisable.

12. What guarantees of leniency exist if a party cooperates?

Apart from the legal prerequisites set out in Articles 8 and 12 ACart for a full or partial waiver of the sanction, there are no guarantees of leniency if a party cooperates. It remains to be seen in practice whether, despite the lack of any guarantees, the leniency system will encourage companies to come forward and to cooperate with the Competition Commission.

In case of a sanction despite a leniency application (or a fine which has not been reduced), the sanctioned enterprise can file an appeal to the Federal Appeals Commission for Competition Matters (Article 53(2) ACart). In the appeals procedure, the decision of the

Competition Commission will be reviewed as to the facts and the legal rules applied in order to find out whether a full or partial waiver of the sanction should have been granted. The decision of the Federal Appeals Commission for Competition Matters may be subject to an administrative appeal to the Federal Supreme Court.

13. Is confidentiality afforded to the leniency applicant and other cooperating parties? If so, to what extent?

The enterprise seeking leniency may apply confidentially by filing the information in an anonymous way (Article 9(2) OS ACart). In its information on the leniency application form, the Competition Commission notes that by confirming the receipt of the application, the Secretariat will inform the enterprise about the deadline within which it must disclose its identity. The extent to which confidentiality is afforded will thus be dependent on the circumstances of the specific case. As set out in Article 9(2) OS ACart, the Secretariat shall define the modalities of anonymous applications on a case-by-case basis with the consent of a member of the governing board of the Competition Commission. Given that there have not been any cases of an anonymous application so far (at least, no case has come to public attention), no practical experience with the Competition Commission can be reported.

Confidential treatment of a leniency application in non-anonymous form is usually afforded, at least until dawn raids have been conducted. Once an investigation has been opened, there will come a point in time when the confidentiality of the leniency applicant may not be kept any longer. Possible defendants are entitled to a due process and thus must be granted access to the file and be given the opportunity to comment on the alleged infringements, at the latest when the statement of objections is issued. At this stage of the investigation, the identity of the leniency applicant will have become publicly known, if the respective company has not disclosed the leniency motion itself by then.

CONSEQUENCES

14. What effects does leniency granted to a corporate defendant have on the defendant's employees?

Leniency granted to an enterprise does not have an immediate effect on its employees because, according to Article 49 a ACart, only enterprises participating in illegal restraints of competition can be sanctioned by fines of up to 10 per cent of the turnover achieved in Switzerland during the last three business years. Employees cannot be directly sanctioned. However, according to Article 54 ACart, criminal sanctions for employees are possible for certain violations of consensual arrangements and orders of the authorities (cf question 15).

15. Does leniency bar further criminal or private enforcement?

Leniency does not bar criminal enforcement in so far as the Swiss Act on Cartels provides for criminal sanctions in case of certain violations of consensual arrangements and orders of the authorities. Whoever intentionally violates a consensual arrangement, a final order of the competition authorities or a decision by the appeals authorities, shall be punished with a fine of up to CHF 100,000 (Article 54 ACart). Similarly, an individual may be punished with a fine of up to CHF 20,000 for intentionally disregarding, or only partially complying with, decisions of the competition authorities regarding the duty to provide information (Articles 55, 40 ACart). Strictly speaking, however, the possibility of these criminal sanctions is not directly related to leniency.

Leniency does not bar private enforcement. Whoever is impeded by an unlawful restraint of competition from entering or competing in a market may request removal or cessation of the obstacle, damages and reparations in accordance with the Swiss code of obligations, or remittance of illicitly earned profits in accordance with the provisions on conducting business without a mandate (Article 12(1) ACart). Competitors, either actual or potential, may therefore sue an enterprise that has successfully applied for leniency. Consumers who may

have been harmed by the illegal restraints of competition, however, cannot stake a claim under Article 12(1) ACart. The instrument of a class action, as seen in the US, does not exist in Switzerland.

REFORM/LATEST DEVELOPMENTS

16. Is there a reform underway to revisit the leniency policy? What are the latest developments?

The Swiss leniency system only entered into force on 1 April 2005 after the grace period elapsed. Therefore, prior to any reform considerations, practical experience of the new leniency policy has to be gained. In this respect, it will be interesting to follow the on-going investigation of the air cargo industry and leniency cases that have not yet become public.