SWITZERLAND

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BACKGROUND

1. What is the relevant legislation concerning leniency policy and who is the enforcing body? Has the enforcing body issued any supplementary guidance in support of the relevant leniency legislation?

The relevant legislation in Switzerland is the Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (Cartel Act). An amendment to the Cartel Act in 2003, which entered into force on 1 April 2004, introduced the Competition Commission's power to order substantial fines for first time infringements of the most important substantive rules, and a leniency system.

According to Article 49a(2) of the Cartel Act, the sanction may be waived, in whole or in part, if the enterprise co-operates in uncovering and eliminating the restraint of competition. The conditions and the procedure for full or partial exemption from sanctions under Article 49a(2) of the Cartel Act are contained in the Ordinance on Sanctions regarding illegal restraints of competition of 12 March 2004 (Sanctions Ordinance). 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 Cartel Act. The main administrative body enforcing the Cartel Act is the Competition Commission which is elected by, but independent of, the Federal Government. For administrative purposes, it 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.

The Secretariat of the Competition Commission conducts investigations and preliminary investigations and prepares the Competition Commission's decisions.

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

The Competition Commission provides on its website (*www.weko.admin.ch*) a leniency application form (available in English) in which it summarises the necessary information for filing an application. 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.

2. What are the basic tenets of the leniency programme? Is leniency available for competition law violations other than cartels?

The leniency rules were introduced by the 2003 Amendment to the Cartel Act. According to Article 49a(2) of the Cartel Act, an enterprise taking part in the disclosure and removal of a restraint of competition may benefit from immunity or a reduction in fines. Although the Sanctions Ordinance explicitly regulates the application of immunity or a reduction in fines only in cases of horizontal and vertical agreements according to Article 5(3) and 5(4) of the Cartel Act, it is widely

held, based on the wording of Article 49(a) of the Cartel Act, that a waiver is also available in the case of illegal practices by market-dominant enterprises according to Article 7 of the Cartel Act, if the necessary requirements are fulfilled. The Sanctions Ordinance specifies that full waivers are available to first-movers only, for information leading to the opening of an investigation based on Article 5(3) and (4) of the Cartel Act or for submitting evidence permitting the discovery of an infringement of these provisions (Article 8 of the Sanctions Ordinance, also with additional prerequisites, for example the termination of participation in the infringement of competition – see question 8 for all prerequisites). Reduced fines are available to enterprises participating voluntarily in an investigation and which, 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% of the fine that would otherwise be imposed to sanction the anti-competitive practice. It is determined based on the role played by the enterprise in the success of the proceeding under Article 12(2) of the Sanctions Ordinance. Under Article 9 of the Sanctions Ordinance, leniency applications may be made orally and anonymously.

3. Is there an "immunity plus" or "amnesty plus" option? If not, in practice, can a leniency applicant receive a reduction of its fine for its participation in a first cartel if it reports its participation in a second, unrelated cartel?

The Competition Commission may reduce the sanction by up to 80% if an enterprise provides information or evidence on an unsolicited basis regarding further competition infringements pursuant to Article 5(3) or (4) of the Cartel Act. This is known as "bonus plus". In a ruling dated 18 October 2010, the Competition Commission fined four companies supplying builders with fittings for windows and French doors, the sanctions amounting to a total of around CHF7.6 million. The companies had agreed on the timing and level of a general increase in prices, which effectively made them a price cartel. In the case of one company, the fine was fully waived as it was the first to report participation in the cartel to the competition authorities. A further undertaking obtained a reduction of its sanction by 60% for reporting additional infringements to the competition authorities. This was the first so-called "bonus plus" case.

4. How many cartel decisions involving leniency applications have been rendered since 1 January 2013? How many companies have received full immunity from fines during that period?

Five cases have been reported since 1 January 2013.

On 22 May 2013, the Competition Commission opened an investigation into various Swiss concessionaires of manufacturers in the Volkswagen Group with regard to possible pricing agreements. The subject of these possible agreements is the fixing of discount and flat rate deductions in retail sales of new vehicles. The leniency request for complete immunity was granted in one case based on an amicable settlement. The investigation against the other concessionaires is ongoing.

On 22 April 2013, the Competition Commission imposed sanctions on 12 road construction companies. These companies were involved in the co-ordination of prices in private and public tenders and the allocation of road paving projects in 30 relevant bid rigging arrangements between 2006 and 2009. The individual fines ranged from approximately CHF3,000 to approximately CHF124,000 and a total of approximately CHF489,000. The sanction for one company was fully waived based on the leniency statement and the fact that it co-operated with the competition authority.

On 2 December 2013, the Competition Commission sanctioned 11 airlines for horizontal price fixing agreements. The Competition Commission concluded that the airlines had entered into agreements on pricing elements relating to freight rates, fuel surcharges, war risk surcharges, customs clearance surcharges for the US and the commissioning of surcharges

during the period from 2000 to 2005. Deutsche Lufthansa AG and its subsidiaries Lufthansa Cargo AG, Swiss International Air Lines AG and Austrian Airlines AG were granted a fine reduction of 100% on the basis of a leniency application. Five further airlines received reduced sanctions based on leniency applications submitted after initiation of the investigation: Cathay Pacific Airways Ltd. and British Airways Plc. received a fine reduction of 50% whereas Japan Airlines Co., Ltd. was given a fine reduction of 30%. Air France-KLM SA and Cargolux Airlines International SA received a reduction of the fine of 20% and 10% respectively. The total of all fines amounts to CHF11 million.

On 17 November 2014, the Competition Commission imposed sanctions on various Swiss retailers of door fittings. They agreed to fix minimum margins on the resale of their products between 2002 and 2007. In the case of one company, the fine was fully waived based on the leniency application. The total of all fines amounts to CHF 185,000.

In February 2015, the Competition Commission sanctioned three companies involved in a price fixing agreement in public tenders and the allocation of tunnel cleaning projects between 2008 and 2013. The fines totalled approximately CHF 161,000. The sanction for one company was fully waived based on the leniency application; whereas the other two companies were given a sanction reduction of 50% and 10% respectively also due to the leniency applications. The decision of the Competition Commission was based on an amicable settlement with the parties.

In total five companies have received full immunity from fines during that period.

5. What is needed to be a successful leniency applicant? Is documentary evidence required or is testimonial evidence sufficient (can an applicant be awarded leniency by providing the enforcing body with testimonial evidence only)? How are "useful contributions" or "added value" defined? Is there any sanction for misleading or incorrect leniency applications?

The kind of evidence that is needed for a successful leniency application is dependent on the information and evidence the Competition Commission 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 of the Cartel. 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 proceedings regarding the restraint of competition.
- If the competition authorities already have knowledge of the restraint of competition, the enterprise seeking a full waiver of sanctions should submit evidence which enables the competition authorities to establish a competition infringement under Article 5(3) or (4) of the Cartel Act. The waiver of the sanction in this case shall only be granted if no other enterprise already fulfils the prerequisites for a waiver according to Article 8(1) of the Sanctions Ordinance and the competition authority does not already have evidence sufficient to prove the anti-competitive practice.

Oral information may thus be sufficient if it brings the competition restriction to the competition authority's attention. 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 application, provided that no other enterprise has previously co-operated with the competition authority. Immunity from fines is limited to the first enterprise reporting to and co-operating with the authorities, whereas sanctions for other co-operating enterprises can only be reduced.

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. The Competition Commission stated in the first "bonus plus" case (see question 3) that it was crucial to submit, voluntarily, information or evidence regarding further violations of competition law, while at the same time the extent to which the enterprise contributed to the success of the procedure was important. It was sufficient that the enterprise concerned facilitated the Competition Commission's screening of the retained evidence.

There is no sanction for misleading or incorrect leniency applications. The consequence is simply that the applicant fails to meet the requirements for obtaining immunity from or a reduction in fines (for further details see questions 8 and 19).

PROCEDURE

6. What are the practical steps required to apply for leniency? Is it possible to have an initial anonymous contact with the enforcing body before actually applying for leniency or do parties have to give full disclosure of their identity at any time?

The Competition Commission advises that leniency applications should be made to the Secretariat of the Competition Commission 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.

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

Attention should be paid to the necessary procedural safeguards when making a leniency application. This holds particularly true for the leniency regime in Switzerland, as access to documents during an investigation in general is granted on broader terms than is the case in the EU. According to Article 43 of the Cartel Act in conjunction with Article 6 of the Federal Act on Administrative Procedures, all parties which are formally allowed to take part in an investigation have, in principle, access to the relevant evidence. Only business secrets are excluded. Contrary to its former practice, the Competition Commission no longer differentiates between general evidence of the investigation and specific evidence which is related to the leniency application. It no longer assigns the leniency submission a separate, confidential file with a different file number.

The Secretariat nevertheless acknowledges that special safeguards regarding confidentiality should be maintained. Therefore, the Competition Commission states on its website that the corporate leniency statement will only be used in the proceedings of the Competition Commission and shall not be disclosed to other companies or for other proceedings. Similar to the practice of the European Commission, access to the corporate leniency statement is only granted to other defendants, and at a rather advanced stage of the investigation (usually when the statement of objections is issued). Moreover, the other defendants are only allowed to read the corporate leniency statement at the premises of the Competition Commission. The making of photocopies is prohibited. In so doing, the Competition Commission undertakes to strike a balance between confidentiality protection and the rights of the defence.

It is not clear whether such a restricted access to the corporate leniency statement is consistent with Article 43 of the Cartel Act. This provision sets out, in general, the requirements under which individuals, legal entities and associations can participate in an investigation concerning a restraint of competition as third parties. In principle, a third party has the right

to obtain access to the case file. According to its wording, Article 43 of the Cartel Act does not exclude corporate leniency statements. The question whether access to the corporate leniency statements can be limited to other defendants has not yet been tested in court.

The leniency applicant may have initial anonymous contact with the competition authority before applying for leniency.

7. Is there a marker system?

There is a marker system.

7.1 If so, is it available to all leniency applicants to secure their rank or only to the first in line?

Yes, see question 7.2 below for details.

7.2 If so, what initial information has to be made available in order to qualify for a marker and what conditions apply to the perfection of a marker? Are there any set deadlines for the perfection of a marker? If deadlines are discretionary, what is the average length of time given by the enforcing body to perfect a marker?

The enterprise may provide a declaration to the Secretariat stating that it will submit a leniency application (marker). The marker precedes the leniency application and its content is, therefore, much less comprehensive than that of the leniency statement.

The Competition Commission provides on its website a marker application form in which it summarises the necessary information for filing an application.

The marker must include at least the following:

- The name and the address of the enterprise submitting the voluntary report and a contact person.
- A statement that the enterprise coordinated its behaviour with that of other enterprises with the object and/or effect of restraining competition in any way.
- A statement that the enterprise intends to submit a leniency application.
- Indications about the restriction of competition that could be identified with reasonable effort at the moment it applied for the marker: the type and duration of the restriction, the enterprises involved, the goods/services and territories concerned.
- The date and a signature.

In order to determine the precise time of receipt, the Secretariat advises that the marker should be made to the Secretariat by sending the form by e-mail to the following address: *leniency@comco.admin.ch*.

Additionally, the Secretariat recommends reporting the application for the marker by phone.

There is also the possibility of applying for a marker by fax (+41 58 462 20 53), to deliver it in person (or to have it delivered by a representative or, in agreement with the Secretariat, to make an oral statement on record at its premises (Monbijoustrasse 43, 3003 Bern).

The marker is available to all leniency applicants. The time stamp a marker is granted determines the rank of the leniency application, so long as it is supplemented by a leniency application that meets the requirements to grant immunity from or a reduction in fines. The marker is inapplicable if the enterprise does not submit a leniency application after submitting a marker. The ranking it had received becomes available again and will be taken by the next enterprise which entered a marker.

The marker is not a condition for the submission of a leniency application. The enterprise may also put in the leniency application directly to the competition authority.

After submitting a marker, the enterprise is obliged to co-operate with the Competition Commission. Otherwise it will lose the marker.

The Secretariat immediately confirms the receipt of an application for the marker, including the date and time of receipt and sets a deadline for the enterprise to submit its leniency application.

TIMING/BENEFIT

8. What are the benefits of being "first in" to apply for leniency? Is full immunity available for the first applicant?

The benefits of being "first in" to co-operate are a full waiver of the sanction provided that all prerequisites for such a waiver are fulfilled (for further details see question 12).

A corporate leniency statement 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 corporate leniency statement may also be made orally for the record. The enterprise may even submit the corporate leniency statement by presenting the information in anonymous form.

The Secretariat of the Competition Commission can define the modalities of the corporate leniency statement on a case-by-case basis with the consent of a member of the presiding body of the Competition Commission. As general guidance, the Secretariat has issued an application form that is available (also in English) on its website.

Since time is of the essence for leniency applications, the Secretariat confirms receipt of the corporate leniency statement (marker), including the date and time of receipt. It communicates to the notifying enterprise, with the consent of a member of the presiding body of the Competition Commission, as to:

- Whether it considers the prerequisites for a complete waiver of the sanction according to Article 8(1) of the Sanctions Ordinance to have been fulfilled. However, a leniency applicant should take into consideration that this communication may contain an important caveat, that is, 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 which the notifying enterprise should submit, in particular in order to fulfil the prerequisites of Article 8(1) of the Sanctions Ordinance.
- In the case of an anonymous corporate leniency statement, the time period within which the enterprise should disclose its identity.

In the case of multiple corporate leniency statements, the competition authority must examine subsequent corporate leniency statements only upon having decided according to Article 9(3) of the Sanctions Ordinance on the earlier corporate leniency statements. 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) of the Sanctions Ordinance if it subsequently becomes aware of facts preventing the waiver of the sanction. The fact that the ultimate decision on a full waiver of the fine will be made only at the very end of the proceedings is a considerable drawback for leniency applicants. Until then, there may be quite a long period of uncertainty without any full guarantee from the competition authority.

9. What are the consequences of being "second" to apply for leniency? If applicable, what benefits (including the level of fine reduction) can be expected by a leniency applicant in "second position"?

As set out under question 8, the full exemption from sanctions can only be granted to one single enterprise, the one who first reports to the authorities (provided other conditions are also fulfilled). When another enterprise meets the requirements stated in Articles 8 and 9 of the Sanctions Ordinance, 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.

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 to the Competition Commission, has ceased participation in the anti-competitive practice. The fine can be reduced by up to 50%, depending on the extent to which the enterprise contributes to the success of the proceedings. The reduction may even be up to 80% of the amount of the sanction when an enterprise provides information or evidence on an unsolicited basis regarding further competition infringements pursuant to Article 5(3) or (4) of the Cartel Act.

An enterprise seeking a reduction in fines has to contact the Secretariat of the Competition Commission and submit the necessary information regarding its identity and activities, 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. It is the Competition Commission which will decide on the amount of the reduction granted to the co-operating enterprise. Should the co-operating enterprise submit to the Competition Commission evidence on the duration of the anti-competitive practice of which the Commission was unaware, the latter will calculate the sanction without taking this time period into consideration.

10. Can subsequent leniency applicants be given beneficial treatment? If so, is there a limit to the number of subsequent applicants who may receive such beneficial treatment? If applicable, what benefits (including the level of fine reduction) can be expected by subsequent applicants?

As long as an enterprise concerned participates on an unsolicited basis in a proceeding and has ceased participation in the anti-competitive practice when starting the co-operation with the authority, the benefit of a reduced sanction can be granted to subsequent applicants. Of course, the more participants in an anti-competitive practice who co-operate with the Competition Commission, the more difficult it will become to play a substantial role in the success of the proceeding. This is why it might be difficult to reach the same level of reduction as a previously co-operating enterprise. As set out under question 9, the sanction may be reduced by up to a maximum of 50%.

PARENTAL LIABILITY

11. Are there any aspects related to parental liability that have played a role in the granting of leniency to applicants and/or their former or current parent companies? Does a former parent company benefit from its former subsidiary's leniency application for practices implemented by this former subsidiary, which applied for leniency after being divested?

Based on the press release of the Competition Commission regarding the airline case of 10 January 2014 (*COMCO fines several airlines*), parental liability may have played a role in this case (the case has not yet been published).

SCOPE OF LENIENCY

12. What specific conditions must be met in order to benefit from leniency or immunity?

12.1 Can ringleaders or coercers receive leniency or full immunity?

12.2 Are there any specifically stated requirements, such as an obligation to "co-operate fully and on an ongoing basis" and what do such requirements entail?

12.3 Does the enforcing body require the leniency applicant to cease participation in the cartel conduct after its application?

As already set out in question 5, 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 proceedings or is first to submit evidence enabling the Competition Commission to discover an illegal restraint of competition according to Article 5(3) and (4) of the Cartel Act.

In both cases, the following further requirements must be cumulatively satisfied. The enterprise:

- Should not have forced any other enterprise to participate in the infringement 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 infringement of competition in its possession.
- Should co-operate continuously, without reservations and delay with the competition authority during the entire duration of the proceeding.
- Should cease its participation in the infringement of competition no later than at the time of its leniency application or upon first order by the competition authority.

Moreover, the waiver of the sanction is not possible if the competition authority already has sufficient information to open an investigation regarding the restraint of competition according to Articles 26 and 27 of the Cartel Act or already has sufficient evidence to prove the anti- competitive practice. However, the Competition Commission made it clear that it is not impossible for a company to receive immunity, even if 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 from providing 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 already has sufficient evidence. The company being raided may still opt to provide suitable evidence

voluntarily and unsolicited. A company is only obliged to endure the dawn raid, but cannot be forced to actively support it. The company representatives do, however, have the possibility to apply for full leniency during a dawn raid and to offer to co-operate fully with the authorities. Even if 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.

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 immunity from fines. An "instigating" or "leading" role may well be debatable depending on the specific circumstances. In case of serious doubts in that respect, an enterprise may decide to abstain from applying for leniency, at least if only a full waiver of the sanction is an acceptable outcome.

Staff members of the Secretariat have publicly stated that appealing against a dawn raid or a sequestration may put at risk the advantages of a leniency application. The Secretariat of the Competition Commission takes the position that the duty of continuous and unreserved co-operation without delay can hardly be reconciled with raising a complaint or bringing an appeal against investigation measures. Companies may thus be prevented from having recourse to legal remedies after having filed a leniency application. The legality of the position taken by the Secretariat has, however, not yet been tested in court.

See questions 9 and 10 regarding the conditions for receiving a reduction in fines.

13. Is there any guarantee of obtaining the final benefit of a leniency application (immunity or reduction of fine) if a leniency applicant co-operates fully with the enforcing body?

13.1 At what stage during the procedure, can a leniency applicant become certain of the benefit he will get from his leniency application (rank in the leniency queue and fine immunity/ reduction)?

13.2 What are the possibilities of later leniency applicants moving to a higher position in the leniency queue as a result of the added value they may be able to offer in comparison to earlier leniency applicants? Please provide references to cases where this may have occurred.

The Competition Commission decides on the reduction of the sanction only at the end of the procedure.

Hence, even if the legal prerequisites set out in Articles 8 and 12 of the Cartel Act for a full or partial waiver of the sanction are observed, there are no guarantees of leniency if a party co-operates until such a decision has been taken. 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 co-operate with the Competition Commission.

Complete immunity may only be granted to one enterprise. The one who first reports to the competition authority and meets the requirements according to Article 8 of the Sanctions Ordinance keeps this first position. There is no possibility of later leniency applicants moving to a higher position as a result of the added value they may be able to offer in comparison to earlier leniency applicants. The Competition Commission may reduce the sanction by up to 50% for each of the subsequent leniency applicants based on the extent to which the enterprise contributes to the procedures success. The reduction may amount to a maximum of 80% in the case of "bonus plus".

OTHER CONSEQUENCES

14. What effect does leniency granted to a corporate entity have on the entity's employees? Does it protect them from criminal and/or civil liability?

Leniency granted to an enterprise does not have an immediate effect on its employees because, according to Article 49a of the Cartel Act, only enterprises participating in illegal restraints of competition can be sanctioned with first time infringement fines of up to 10% of the turnover achieved in Switzerland during the last three business years. Employees cannot be sanctioned for first time infringements. In the case of a repeat infringement violating an order of an authority, individuals who are responsible for this repeat infringement can be sanctioned personally. Criminal enforcement against individuals in Switzerland is limited to certain infringements of amicable settlements with, and orders by, the authorities. Leniency does not bar these criminal sanctions against individuals, but they would only become relevant in the case of a leniency application in a repeat infringement case in which an individual has responsibility for a repeat infringement which violates an order or an amicable settlement. Whoever intentionally violates an amicable settlement, a final order of the competition authorities, or a decision by the appeals authorities is punished with a fine of up to CHF100,000 (Article 54 of the Cartel Act). An individual may also be punished with a fine of up to CHF20,000 for intentionally disregarding, or only partially complying with, decisions of the competition authorities regarding the duty to provide information.

Leniency granted to an enterprise does not provide protection from civil liability. Third parties affected by a cartel may sue for damages in civil courts.

15. If individual employees are potentially exposed to administrative or criminal sanctions, is there a separate leniency/whistleblowing system available for individual employees? If so, please explain the system and the interaction between corporate and individual leniency.

There is no separate leniency/whistleblowing system available for individual employees.

16. Does qualifying for leniency affect the possibility of appealing the decision by which the leniency is granted (are leniency applicants prevented from appealing certain aspects of the decision and if so which ones)?

According to the current Competition Commission practice, a leniency applicant may not deny its participation in an agreement or concerted practice or generally deny any (possible) harmful effects on competition. If the leniency applicant denies any illegal restraint of competition according to Article 5(3) or (4) of the Cartel Act., it does not constitute a leniency application according to the Sanctions Ordinance.

On 23 September 2014, however, the Federal Court for Administrative Matters stated in decision B-8430/2010 that leniency applicants may appeal the legal assessment regarding the existence of an illegal restraint of competition according to Article 5(3) or (4) of the Cartel Act. It is permissible for a leniency applicant to co-operate with the competition authority and subsequently dispute the legal assessment of the facts (the decision was appealed to the Federal Supreme Court).

17. Has there been any landmark case law that has led to a reversal of the leniency originally granted in the decision under appeal?

No, up to now there has been no reversal of the leniency status on appeal.

18. Does the granting of leniency prevent third parties from seeking civil damages or protect the leniency applicant in whole or in part from further private enforcement?

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. Other market participants may therefore sue an enterprise that has successfully applied for leniency. Class actions, as seen in the United States, do not exist in Switzerland.

PROTECTION AGAINST DISCLOSURE/CONFIDENTIALITY

19. Is confidentiality afforded to the leniency applicant and other co-operating parties? If so, to what extent?

Please see 19.3 below.

19.1 Is the identity of the leniency applicant/other co-operating parties disclosed during the investigation or only in the final decision?

Please see 19.3 below.

19.2 Is information provided by the leniency applicant/other co-operating parties passed on to other undertakings under investigation?

Please see 19.3 below.

19.3 Can a leniency applicant/other co-operating party request anonymity or confidentiality of information provided, such as business secrets?

The enterprise seeking leniency may apply confidentially by filing the information anonymously. In its information on the leniency application form, the Competition Commission notes that by confirming receipt of the application, its 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) of the Sanctions Ordinance, the Secretariat must define the modalities of anonymous applications on a case-by-case basis with the consent of a member of the presiding board of the Competition Commission. Given that there have not been any cases of an anonymous application so far which have come to the 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 (see also question 6). Once an investigation has been opened, there will come a point in time when the confidentiality of the leniency applicant may no longer be maintained. Possible defendants are entitled to 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 become publicly known, if the respective company has not itself disclosed the fact of a leniency application by then.

The evidence must be disclosed to other defendants in the investigation as part of the right to be heard. The other defendants are only allowed to read the corporate leniency statement at the premises of the Competition Commission. Any form of reproduction (scans, photo and so on) is prohibited.

Business secrets must be protected. Information covered by business secrets is not disclosed.

20. Is leniency in any way affected by any bi-lateral/multi-lateral co-operation to which your jurisdiction is a party?

Leniency is affected by the Agreement between the European Union and Switzerland concerning co-operation on the application of their competition laws entered into force on 1 December 2014 (see question 21).

21. Is the evidence submitted by the leniency applicant protected from transmission to other competition authorities? If so, how?

In Swiss law, no general legal basis exists for the Competition Commission to co-operate with other competition authorities and to deliver to them evidence obtained during an investigation (including information submitted by the leniency applicant).

According to the bilateral Agreement on Civil Aviation with the European Union, which entered into force on 1 June 2002, a contracting party shall give the other contracting party all necessary information and assistance in the case of investigations on possible infringements of the agreement. This includes the exchange of relevant evidence. It is unclear, however, whether confidential information delivered in the course of a leniency application, including the corporate leniency statement, is also covered by this provision. So far, no cases can be reported in this respect.

Under the new Agreement between Switzerland and the EU concerning the co-operation on the application of their competition laws which entered into force on 1 December 2014, the competition authorities in Switzerland and the EU are no longer dependant on the consent of the involved companies.

This agreement allows the Swiss and EU competition authorities to discuss and to transmit to one another confidential information. In the absence of the consent of the affected company, the competition authority may, upon request, transmit for use as evidence, information obtained via the investigative process to the other competition authority under the following conditions (i) both competition authorities must be investigating the same or related behaviour or transaction, (ii) the request for such information must be made in writing and must include a general description of the subject matter and nature of the investigation or the proceedings to which the request relates, and (iii) the competition authority receiving the request must determine, in consultation with the requesting competition authority, what information in its possession is relevant and may be transmitted. The agreement does not stipulate an obligation to discuss or transmit information.

The competition authorities may not discuss or transmit information that was obtained under the respective leniency or settlement procedures, unless the affected company has given its express consent in writing. Furthermore, the competition authorities may not discuss, request or transmit information obtained by investigative process if using such information would be prohibited under the procedural rights and privileges provided by Swiss or European law. This includes the right against self-incrimination and the legal professional privilege.

The discussed or transmitted information may only be used for the effective enforcement of competition law. The receiving authority may only use information obtained by investigative process for the enforcement of competition law regarding the same or connected behaviour or transaction. Information that has been discussed or transmitted pursuant to the agreement may not be used to impose sanctions on natural persons.

The European Commission has a right to transmit information obtained under Article 7 to the national competition authorities, but only to comply with its consultation duties before issuing its decision. The information so transmitted must

not be used other than for the enforcement of competition law by the European Commission and it must not be disclosed. The national competition authorities must not open their own proceedings based on the information so received.

22. To what extent can information submitted by the leniency applicant (transcripts of oral statements or written evidence) become discoverable in subsequent private enforcement claims?

Please see question 22.3 below.

22.1 Can the claimant seeking indemnification of antitrust damages in follow-on actions provide to the court this information where he only had access to it because he was party to the previous proceedings before the competent antitrust authority?

Please see question 22.3 below.

22.2 Can this information be subjected to discovery orders in a private enforcement claim before domestic or foreign courts? Are there any precedents?

Please see question 22.3 below.

22.3 Can this information submitted in a foreign jurisdiction be subjected to discovery orders in the domestic courts?

The Competition Commission restricts access to evidence submitted by the leniency applicant, including the corporate leniency statement, to those companies which allegedly participated in the cartel and thus are defendants in the investigation. Other individuals and enterprises are not normally granted access to the evidence concerning the leniency application. Therefore, they normally do not possess such evidence which they could use, as complaining parties, in subsequent private enforcement claims. It is, however, unclear, due to the lack of precedents, whether a potential claimant in a private enforcement claim, who was a party to the Competition Commission's investigation based on Article 43 of the Cartel Act, might successfully claim access to the file, including the corporate leniency statement.

Furthermore, due to the lack of precedents, it is not clear whether a claimant, who was not a party to the Competition Commission's investigation, can, in a subsequent private enforcement claim, successfully demand the disclosure of the evidence concerning the leniency application. In principle, a claimant can, based on the applicable Cantonal law, request the court that the relevant evidence be disclosed. Thus, a claimant may request the court to demand that the Competition Commission disclose the corporate leniency statement. Moreover, a claimant may request the court to demand that the leniency applicant itself discloses the relevant evidence relating to the leniency application in its possession. The court would decide such a request by balancing all public and private interests involved. In so doing, the court might also ask the Competition Commission for its opinion on the legitimacy of the disclosure of evidence relating to the leniency application. If the court decides in favour of the plaintiff, the Competition Commission or the leniency applicant would be obliged to disclose the evidence, including the corporate leniency statement. As mentioned above, however, the requirements for a potential disclosure have not yet been tested in court. To date, no precedents in which evidence from a leniency application has been discovered in a private enforcement claim are publicly known.

Finally, there are no precedents of third parties applying for (partial) access to the information submitted by the leniency applicant based on the Federal Act on Freedom of Information.

SWITZERLAND

RELATIONSHIP WITH THE EUROPEAN COMMISSION'S LENIENCY NOTICE AND LENIENCY POLICY IN OTHER EU MEMBER STATES

23. Does the enforcing body accept summary applications in line with the ECN Model Leniency Programme?

Not applicable.

24. Does the policy address the interaction with applications under the Commission Leniency Notice? If so, how?

Not applicable.

25. Does the policy address the interaction with applications for leniency in other EU member states? If so, how?

Not applicable.

RELATIONSHIP WITH SETTLEMENT PROCEDURES

26. If there are settlement procedures in your jurisdiction, what is the relationship between leniency and such settlement procedures? Are their possible benefits cumulative?

Leniency and settlement can be combined. There is no provision in the Cartel Act stating that leniency and settlement procedures are mutually exclusive. In practice, most of the small number of cases, in which immunity from or a reduction in fines have been granted to date were concluded based on an amicable settlement of the matter between the Competition Commission and the enterprises involved. The benefits are the shortening of procedure before the Competition Commission and a (small) discount of the fine.

REFORM/LATEST DEVELOPMENTS

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

Currently, there is no reform underway to revisit the leniency policy.

The new Agreement between Switzerland and the EU concerning the co-operation on the application of their competition laws became effective on 1 December 2014. It enables the competition authorities in Switzerland and the EU to discuss and transmit confidential information and documents obtained in merger control and competition proceedings. Even though the agreement was signed on 22 May 2013, it was ratified only during the course of 2014.

In the summer of 2014, the Swiss Parliament decided to regulate the information exchange in a new Article 42b of the Cartel Act which entered into force on 1 December 2014. According to this article, the transmission of confidential information to a foreign competition authority based on an international agreement and without the affected company's consent, may only be allowed under certain conditions set out in Article 42b(2) and that are met by the co-operation agreement. Furthermore, the competition authorities have to inform the involved companies and invite them to provide comments prior to transmitting the information to the foreign competition authority.