Switzerland

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BACKGROUND

1. What is the relevant legislation concerning 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 ACart 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, which did not have a policy on imposing fines for first time infringements, could not impose fines against the companies involved in the cartel in Switzerland. This situation triggered an additional amendment to the ACart in 2003 which entered 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 defines 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. In contrast, first time infringements in the case of agreements that significantly affect competition and cannot be justified on grounds of economic efficiency, can arguably not be sanctioned. This view, however, is controversial; it has not yet been tested in court. Members of the Swiss competition authorities have published articles defending the opposite viewpoint. The maximum fine may amount to up to 10 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; and
- 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 has to be seen in the context of the debate in Swiss Parliament. Prior to the 2003 Amendment, there have been political and public controversies regarding the price level in Switzerland, quite often referred to as 'high-price island' within Europe. The reason for these allegedly high prices has been attributed, among others, to certain vertical restraints.

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 on production, outlets or technical developments; or tying. The definition of abuses of dominant positions is very similar to the one in Article 102 TFEU. 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 to define 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 on 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 ACart. The main administrative body enforcing the ACart 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). 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 (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 into three services (product markets, services, and infrastructure). In addition, the Secretariat consists of six competence centres (law, economics, internal market, international affairs, communications, 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.

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 ACart). Its decisions may be subject to appeal to the Federal Supreme Court (Article 86(1) lit. a of the Federal Act on the Federal Court).

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

The leniency rules were introduced by the 2003 Amendment of the ACart, although there was initially strong opposition in Parliament to this regime because it allegedly put 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. Although the OS ACart explicitly regulates the application of a full or partial waiver of fines only in cases of horizontal and vertical agreements according to Article 5(3) and 5(4) ACart, it is widely held, based on the wording of Article 49(a) ACart, that a waiver is also available in the case of illegal practices by market-dominant enterprises according to Article 7 ACart, if the necessary requirements are fulfilled.

The OS ACart 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) ACart or for submitting evidence permitting the discovery of an infringement of these provisions (Article 8 OS ACart, also with additional prerequisites, eg the termination of participation in the infringement of competition – 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 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 per cent of the fine that would otherwise be imposed to sanction the anticompetitive practice. 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 through 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 taken into account (Article 2 OS ACart). Depending on the severity and type of infringement, 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 infringement lasted between one and five years. If the infringement lasted more than five years, the base amount shall be increased by up to ten per cent for each additional year (Article 4 OS ACart).

In the case of aggravating circumstances, the base amount can be increased. This is in particular the case if the enterprise has repeatedly infringed the Cartel Act, has achieved a particularly high profit through an infringement 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 therewith, 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 mitigating 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 a proceeding (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 programme?

The revised ACart effective on 1 April 2004 contained a transitional provision according to which no fine could be levied if an existent restriction of competition was notified or cancelled within a year following the enactment of Article 49a ACart. This grace period ended on 31 March 2005 so that an application for leniency only made sense after that date. Since then, around five cartels have been unveiled and punished. With respect to full or partial waivers of fines, not all of them relating to leniency applications, six cases are worth mentioning:

- On 18 September 2006, the Competition Commission determined that the Airport Zurich AG (Unique) abused its dominant position by preventing other enterprises from offering 'off-airport valet parking' services, thus violating Article 7 ACart. It penalised Unique according to Article 49a ACart. As Unique cooperated with the Competition Commission during the later stage of the investigation and allowed the involved enterprises to offer their parking services again, the Competition Commission partially reduced the fine. However, the reduction was not granted on the basis of a leniency application. Rather, it was based on the fact that Unique cooperated with the competition authorities, leading to an amicable settlement of the matter between the Competition Commission and Unique.
- On 15 August 2007, Felco SA, an enterprise producing, *inter alia*, scissors for gardening purposes, contacted the Secretariat and made a leniency application concerning a vertical agreement between Felco SA and a retailer, Landi, on minimum prices (resale price maintenance). The Competition Commission initiated an investigation and considered this agreement to be unlawful, violating Article 5(4) ACart. Felco SA requested that a full waiver of fines be granted on the basis of its leniency application. The Competition Commission, however, fined both enterprises involved, including Felco SA. It acknowledged that Felco SA informed the competition authorities about the unlawful agreement and, subsequently, cooperated in the investigation, leading to an amicable settlement of the matter. However, the Competition Commission refused to fully waive the fine as Felco SA had taken a leading role in acting contrary to the ACart (Article 8(2) lit. a OS ACart).
- On 31 January 2008, the Secretariat of the Competition Commission conducted dawn raids against various enterprises in the electric installation sector in order to examine allegedly illegal arrangements ('bid rigging') among competitors in public procurement biddings in the Berne region. After the investigation was concluded, the Competition Commission decided that the practices violated Article 5(3) ACart, and it fined the enterprises involved accordingly. The enterprise, which had been the first to announce full cooperation after the dawn raid was started, was granted a fine reduction of 100 per cent, whereas the other enterprises were given a fine reduction of 40 per cent. Thus the reductions were not granted on the basis of a leniency application before the investigation was initiated by the Competition Commission.

Rather, they were approved because the enterprises fully cooperated in uncovering and eliminating the restraint of competition in question after the investigation was already under way.

- On 10 May 2010, the Competition Commission fined two manufacturers of components for heating, refrigeration and sanitary installations due to agreements on the level and timing of price increases (a price cartel). The Competition Commission found that the two undertakings had coordinated the amounts and dates of price increases for various products in Switzerland. Flamco AG was fined CHF 169,000 while Pneumatex AG would have received a fine of around CHF 5.2 million. However, the fine was waived in its entirety as Pneumatex was the first company to report participation in the cartel to the competition authorities (report under the bonus or leniency system respectively). The decision of the Competition Commission was based on an amicable settlement with the parties and is legally binding.
- 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 CHF 7.6 million. The companies had agreed on the timing and level of a general increase in prices, which effectively made them a price cartel. The individual fines ranged from approximately CHF 235,000 to approximately CHF 3.9 million and a total of approximately CHF 7.6 million. 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 per cent for reporting additional infringements to the competition authorities (this was the first so called 'bonus plus' case).
- On 16 December 2011, the Competition Commission issued its decision regarding bid-rigging and allocation of markets by 17 construction companies. These companies were involved in the coordination of prices in public and private tenders and the allocation of construction projects as well as customers in approximately 100 cases dated 2006 until 2009. The fine for one company was fully waived based on the leniency statement whereas six companies obtained reductions of their fines due to the bonus system and the cooperation during the investigation. The total of all fines amounts to CHF 4 million.

Moreover, there are certain indications that a number of pending investigations have been triggered by leniency applications.

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 proceedings 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 a full waiver of sanctions should submit evidence which enables the competition authorities to establish a competition infringement under Article 5(3) or (4) ACart. 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) 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 (Article 9(1) OS ACart according to which the leniency application 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 application, provided that no other enterprise has previously cooperated with the competition authority. As already set out in question 2 (also see question 6), full exemption from sanctions is limited to the first enterprise reporting to and cooperating with the authorities, whereas sanctions for other cooperating enterprises can only be reduced (partial immunity).

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 such a waiver are fulfilled (for further details see question 8).

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 (Article 9(1) OS ACart). The enterprise may even submit the corporate leniency statement by presenting the information in anonymous form (Article 9(2) OS ACart). 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 (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 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) 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 which 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 corporate leniency statement, the time period within which the enterprise should disclose its identity (see Article 9(3) OS ACart).

In the case of multiple corporate leniency statements, the competition authority shall examine subsequent corporate leniency statements only upon having decided according to Article 9(3) OS ACart on the earlier corporate leniency statements (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). 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.

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 (provided other conditions are fulfilled too). 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 to the Competition Commission, 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 proceedings (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 infringements pursuant to Article 5(3) or (4) ACart (Article 12(3) OS ACart), see question 3 regarding the first Swiss 'bonus plus' case.

The enterprise seeking a partial exemption from sanctions 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 (Article 13 OS ACart). It is the Competition Commission which will decide on the amount 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 (see question 3). Of course, the more participants in an anti-competitive practice which are cooperating with the Competition Commission, the more difficult it will become to play a substantial role in the success of the proceeding (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 of 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 (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. 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.

SCOPE/FULL LENIENCY

8. Is it possible to receive full leniency? If so, what are the conditions required to receive full leniency? Can ringleaders/coercers receive full leniency? If there is a requirement to 'cooperate fully and on an ongoing basis' what does it entail? Does the regulatory authority require the applicant to cease participation in the cartel conduct after its application?

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 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) 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

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 cooperate continuously, without reservations and delay with the competition authority during the entire duration of the proceeding; and
- 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 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 Competition Commission made it clear that it is not impossible for a company to receive full leniency even if the leniency application is filed only at the time of a dawn raid (see question 3). 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 raided may still opt to provide suitable evidence voluntarily and unsolicited. A company is only obliged to endure the house search, 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 full cooperation 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 (see 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, 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 cooperation 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.

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

At the time of writing, in four cases has a company received full immunity from fines. The cases concerned: (i) the illegal arrangements ('bid rigging') among competitors in public procurement biddings; (ii) the price cartel of manufacturers of components for heating, refrigeration and sanitary installations; (iii) the price cartel of four companies supplying builders with fittings for windows and French doors; and (iv) the bid-rigging and allocation of markets by 17 construction companies (see question 3).

PROCEDURE

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 Articles 9(1) and 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/dienstleistungen/00106/index.html?lang=en*).

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. The application must be filed at:

Secretariat of the 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.

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 European Union. According to Article 43 ACart 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 ACart. 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 ACart 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.

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 be able to benefit from a full exemption from sanctions, it is advisable to come forward as soon as possible. Otherwise, the Competition Commission might obtain knowledge about the illegal restraint of competition from other participants or through its own investigations. If this is the case, in principle (see questions 4 and 8), a full waiver will no longer be available. In multi-jurisdictional cases, a coordination of the Swiss leniency application with leniency applications submitted in other countries concerned is advisable. In such cases, the Swiss competition authorities may ask the leniency applicant for a waiver, permitting contacts with other competition agencies in order to coordinate the timing of dawn raids.

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 the case of a sanction despite a leniency application (or a fine which has not been reduced), the sanctioned enterprise may file an appeal to the Federal Court for Administrative Matters (Article 33 lit. f of the Federal Act on the Court for Administrative Matters). 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 Court for

Administrative Matters may be subject to an appeal to the Federal Supreme Court. The Federal Supreme Court, which is the highest appeals court in competition matters, is competent to review questions of law. Facts can only be reviewed by way of exception and to a very limited extent, in particular if they are qualified as obviously inaccurate or are based on an infringement of law and if the correction of these facts is crucial for the outcome of the procedure.

CONSEQUENCES

13. What effects does leniency granted to a corporate defendant have on the defendant'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 ACart, only enterprises participating in illegal restraints of competition can be sanctioned with first time infringement fines of up to 10 per cent 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 shall be punished with a fine of up to CHF 100,000 (Article 54 ACart). An individual may also 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 and 40 ACart).

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

14. Does leniency bar 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 (Article 12(1) ACart). Other market participants may therefore sue an enterprise that has successfully applied for leniency. The instrument of a class action, as seen in the United States, does not exist, however, in Switzerland.

PROTECTION AGAINST DISCLOSURE/CONFIDENTIALITY

15. Is confidentiality afforded to the leniency applicant and other cooperating parties? If so, to what extent? Is the identity of the leniency applicant/other cooperating parties disclosed during the investigation or in the final decision? Is information provided by the leniency applicant/ other cooperating parties passed on to other undertakings under investigation? Can a leniency applicant/other cooperating party request anonymity or confidentiality of information provided?

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 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) 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 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 10). 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 become publicly known, if the respective company has not disclosed the fact of a leniency motion itself by then.

16. Is the evidence submitted by the leniency applicant protected from transmission to other competition authorities with whom the authority in question cooperates? If so, how?

In Swiss law, no legal basis exists for the Competition Commission to cooperate with other competition authorities and to deliver to them evidence obtained during an investigation. This holds also true for information which has been brought to the attention of the Competition Commission by a 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 (Article 19 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 (see also questions 10 and 15).

In the context of a free trade agreement with Japan (which entered into force on 1 September 2009) as part of an implementation agreement, a formal cooperation on competition issues has been conducted. This is the first detailed cooperation agreement on competition issues that Switzerland has signed. Based on the main and implementation agreement (which entered into force on 1 September 2009), both countries shall cooperate in enforcement activities (any investigation or proceeding conducted by a party in relation to the application of the competition law of its country) and exchange information to the extent consistent with each country's laws and regulations and important interests.

Currently, a cooperation agreement on competition matters with the European Union is under negotiation. It is the parties' intention to facilitate the exchange of information, including confidential information, between the Swiss competition authorities and the European Commission.

17. To what extent can evidence submitted by the leniency applicant (transcripts of oral statements or written evidence) become discoverable in subsequent private enforcement claims? Can leniency information be subjected to discovery orders in the domestic courts? Can leniency information be subjected to discovery orders in foreign courts? Can leniency information submitted in a foreign jurisdiction be subjected to discovery orders in the domestic courts?

As has been outlined under question 10, 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 normally are not 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 plaintiff in a private enforcement claim, who was a party to the Competition Commission's investigation based on Article 43 ACart, 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 plaintiff, 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 plaintiff can, based on the applicable Cantonal law, request the court that the relevant evidence be disclosed. Thus, a plaintiff may request the court to demand that the Competition Commission disclose the corporate leniency statement. Moreover, a plaintiff 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 (see question 18).

18. Are there any precedents in which evidence from a leniency application has been discovered in a private enforcement claim?

As of the date of writing, no precedents in which evidence from a leniency application has been discovered in a private enforcement claim are publicly known.

RELATIONSHIP WITH SETTLEMENT PROCEDURES

19. What is the relationship between leniency and applicable settlement procedures? Are they mutually exclusive?

There is no provision in the ACart stating that leniency and applicable settlement procedures are mutually exclusive. Leniency and applicable settlement can therefore be combined.

In practice, the small number of cases, in which full or partial waivers of fines have been granted to date, were all concluded based on an amicable settlement of the matter between the Competition Commission and the enterprises involved (see question 3).

REFORM/LATEST DEVELOPMENTS

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

Currently, the ACart is under review. In early 2009, a special evaluation group issued an evaluation report on the efficiency of the ACart. On the basis thereof, the Federal Council published a draft bill for an amendment to the ACart in June 2010 and submitted this draft for public consultation. The draft proposed several fundamental changes to the ACart, such as creation of an independent Federal Competition Court; a differentiated treatment of vertical agreements; an improvement to the objection procedure; modernisation of the control of concentrations; improvements regarding the possibility of international cooperation and strengthening of private enforcement (without introducing any kind of class actions). In September 2010, the Swiss Parliament instructed the government to prepare an amendment to the ACart with respect to: (i) possible reduction of sanctions against undertakings that have implemented compliance programmes; and (ii) the introduction of criminal sanctions against individuals if they have taken active part in horizontal cartel agreements. Accordingly, the government published a draft bill in March 2011 for public consultation. In September 2011, the Federal Council published a further draft bill for an amendment to Article 5 ACart, proposing among other things, a partial prohibition of vertical and horizontal hardcore restrictions combined with a possibility of justification.

After three public consultations the Federal Council submitted its report on the amendment of the ACart to parliament on February 22, 2012. The draft submitted mainly proposes an institutional reform, an amendment to Article 5 ACart including a partial prohibition of vertical and horizontal

hardcore restrictions, the strengthening of private enforcement and the possibility of reducing sanctions in case undertakings have implemented effective compliance programmes. Further, it is proposed to replace the present very strict test for the assessment of concentrations by the SIEC-test. The introduction of criminal sanctions against individuals albeit not included in the draft will have to be discussed by parliament based on a motion of one of its members. The parliament will start to discuss the draft ACart in June 2012 and may add further amendments and changes.. Overall, at this point, it is open when and with what scope an amendment to the ACart will enter into force.