

Cartel leniency in Switzerland: overview

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REGULATION

1. What laws provide for a leniency programme and which regulatory authority administers it? Is there any published guidance?

Applicable laws and guidance

The following laws, regulations and guidelines apply:

- Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act).
- Ordinance on Sanctions imposed for Unlawful Restrictions of Competition 2004 (Ordinance on Sanctions).
- Explanatory Note "Remarks on the Ordinance on Fines" 2004 by the Competition Commission.
- Explanatory Note and Form of the Secretariat of COMCO on Leniency Programme (Leniency Application) of 8 September 2014 (Status as of 26 January 2015).

Regulatory authority

The Competition Commission (COMCO) and the Secretariat of the Competition Commission (Secretariat) have primary responsibility for enforcing the Cartel Act. COMCO is the deciding body in cartel matters, while the Secretariat conducts the investigations.

See box, *The regulatory authority*.

SCOPE OF APPLICATION

2. What infringements of competition law does the leniency programme cover?

The sanctions that are of interest in connection with the leniency programme are the administrative sanctions under Article 49a of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) for first-time infringements of certain substantive law provisions. Only these sanctions are covered by the leniency programme. Only certain practices may lead to sanctions in the case of a first-time infringement (that is, without violation of a prior order by, or settlement with, the Competition Commission (COMCO)) (*Article 49a, Cartel Act*):

- Hard-core horizontal and vertical agreements according to Article 5(3) and (4) of the Cartel Act.
- Abuse of dominant position according to Article 7 of the Cartel Act.

According to the recently issued and revised Explanatory Note and Form of the Secretariat on Leniency Programme it must be assumed that a reduction of a sanction is also possible in cases of abuse of dominance, but only in the form of a partial, as opposed to a full reduction.

RECENT CASES

3. What notable recent cases have applied the leniency programme?

There have been several cases concerning various industries where the leniency programme has been applied. Recent decisions where leniency was granted to one or more of the parties include, among others, cartels in the areas of components for heating and cooling devices (May 2010), window fittings (November 2010), air cargo (December 2012), road construction and civil engineering (January 2012 and June 2013), air freight (January 2014), distribution of automobiles (August 2014; partly ongoing), door fittings (December 2014), tunnel cleaning (March 2015).

AVAILABILITY OF LENIENCY

Administrative liability

4. Is full immunity from administrative penalties available? What conditions must be met for immunity to be granted?

Full immunity from administrative fines is granted if an undertaking is the first to either:

- Provide information enabling the Competition Commission (COMCO) to open an in-depth investigation under Article 27 of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act), provided that COMCO did not have at the time of the notification sufficient information to open a preliminary or an in-depth investigation within the meaning of Articles 26 and 27 of the Cartel Act.
- Provide evidence enabling COMCO to establish a hard-core horizontal or vertical agreement, provided that:
 - no undertaking has already been granted conditional immunity from fines; and
 - that COMCO did not have at the time of submission sufficient evidence to establish the infringement of Swiss competition law.

However, immunity will only be granted if the undertaking:

- Did not coerce any other undertaking to participate in the infringement and was not an instigator or a leader of the cartel.
- Voluntarily submits all information or evidence in its possession concerning the unlawful practice in question to COMCO.
- Co-operates on a continuous basis and expeditiously throughout COMCO's administrative procedure.
- Discontinues its involvement in the infringement no later than the time of the leniency application (voluntary report) or when ordered to do by COMCO.

5. Is there a sliding scale of available leniency from administrative penalties?

An undertaking can benefit from a reduction of the sanction of up to 50% if it fulfils the following criteria:

- Submits the leniency application (or marker) not as the first undertaking and/or does not meet the conditions for full immunity.
- Has co-operated on an unsolicited basis with the Secretariat of the Competition Commission (Secretariat) and Competition Commission (COMCO).
- Ended its involvement in the infringement no later than the time at which it submitted evidence.

The amount of the reduction of a sanction depends on the importance of the contribution to the success of the proceedings, that is in particular, on the timing, the quality and the quantity of the information and evidence submitted.

An undertaking can benefit from a reduction of the sanction of up to 80% (amnesty plus) where both:

- The undertaking provides information to the Secretariat and COMCO about other hard-core restrictions within the meaning of Article 5(3) and (4) of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act).
- The hard-core restrictions were unknown to the Secretariat and COMCO at the time of denunciation.

Any undertaking that did not submit a leniency application, but co-operated with the Secretariat and COMCO (which is taken into account as a mitigating factor) can currently benefit from a reduction of the sanction of up to 20%.

6. Is immunity or leniency for administrative penalties available to individuals? If so, what conditions apply?

Only undertakings can be sanctioned for first-time infringements against the substantive law provisions of Article 5(3) and (4) or Article 7 of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act), which are covered by the leniency programme. However, individuals can act as private undertakings and as such they can be fined. However, to date the Competition Commission has not imposed sanctions against individuals acting as undertakings.

Criminal liability

7. Is immunity or leniency available for companies and/or its employees in relation to criminal prosecution? What are the implications for employees when an undertaking has been granted immunity or leniency?

Circumstances

Companies are not subject to criminal sanctions under the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act). Individuals who are subject to criminal sanctions, cannot be sanctioned for first-time infringements against the substantive law provisions of the Cartel Act. They can only be sanctioned for wilful infringements of settlements and administrative orders, the obligation to provide information and certain other infringements. No immunity or leniency is available for these infringements.

Proceedings against employees

There are no criminal sanctions against individuals for first-time infringements against the substantive law provisions of the Cartel Act. However, individuals acting for an undertaking may be fined up to CHF100,000 if they wilfully violate a settlement decision, a final and non-appealable order of the Competition Commission or the Secretariat of the Competition Commission or a decision of an appellate body (courts).

Individuals who intentionally fail to comply or only partly comply with the obligation to provide information in an ongoing investigation can be fined up to CHF20,000.

Employees' interests

Individuals cannot be sanctioned for first-time infringements against the substantive law provisions of the Cartel Act (*see above, Circumstances*). They can only be sanctioned for other infringements, such as if they intentionally fail to comply or only partly comply with the obligation to provide information in an ongoing investigation (*see above, Proceedings against employees*). No immunity or leniency is available for these infringements.

APPLICATION PROCEEDINGS

8. When should an application for leniency be made?

There is no deadline for applying for leniency. However, timing of the application is relevant because only the first leniency applicant can qualify for full immunity from a sanction (*see Question 4*). Additionally, the amount of the reduction of a sanction for undertakings that do not go in as the first will also (but not only) depend on timing. The amount of the reduction of a sanction for subsequent leniency applications depends on the importance of their contribution to the success of the proceedings, that is in particular, the timing, the quality and the quantity of the information and evidence submitted.

9. What are the procedural rules for leniency applications?

Relevant authority

An application for leniency (or a marker) must be submitted to the Secretariat of the Competition Commission (Secretariat).

Applicant

A leniency application (or marker) can be submitted by the undertaking itself or by its representative. A leniency application can only be submitted by a single undertaking.

Informal/confidential guidance

It is possible to file a leniency application anonymously, for example, by using an attorney as an intermediary. The Secretariat will subsequently inform the undertaking by letter whether the conditions for immunity from a sanction are met and set a deadline within which it must reveal its identity. Additionally, it is possible to contact the Secretariat informally before filing a leniency application.

Form of application

An Explanatory Note and Form of the Secretariat on Leniency Programme (explanatory note) is provided on the Competition Commission's (COMCO's) website (www.weko.admin.ch). It is recommended in the explanatory note to send a leniency application (or marker) to COMCO by e-mail (leniency@comco.admin.ch).

It is also possible to submit a leniency application or a marker by fax (+41 58 462 20 53), to deliver it in person or to have it delivered by a representative. Additionally, delivery by mail is possible but not recommended. The fastest is a submission by e-mail or fax. See also, *Oral statements*.

Markers

It is possible to submit and obtain a marker. The explanatory note provides a form of a marker (*see above, Form of application*).

Information/evidence

A leniency applicant is expected to provide the following information (*explanatory note*):

- Information on the reporting undertaking, including: company name, legal form, address, place of residence/headquarters, contact person, phone number, fax number.
- Alleged infringement of competition.
- Undertakings participating in the alleged infringement of competition.
- The relevant markets concerned and description of these markets.
- Objects and effects of the restraint of competition.
- Evidence.
- Other leniency applications and procedures.
- Other notes and comments.

The Secretariat has repeatedly stated that a leniency application must at least include an admission of the participation in an agreement under Article 4(1) of the Cartel Act subject to potential sanctions. Additionally, according to the Secretariat, an undertaking making a leniency application must, in principle, also admit the effects on the market.

Appeals are currently pending against COMCO decisions. The Federal Administrative Court stated in three decisions rendered in September 2014 concerning one COMCO investigation that information or evidence provided with a leniency application only relates to the facts of a case and that, in any case, a leniency application does not prevent a party from holding a different legal opinion. COMCO appealed two of the three decisions of the Federal Administrative Court, which do not treat all issues equally, and has, at the time of writing, not adapted the Explanatory Note and Form of the Secretariat on Leniency Programme to reflect the mentioned decisions. There is no legal certainty on the question of what a leniency applicant must admit and may not contest (such as the existence of an agreement under Article 4(1) of the Cartel Act). Until the Federal Supreme Court issues a final decision covering the relevant issues, the two different approaches of the Federal Administrative Court and COMCO will probably remain contradictory.

Oral statements

It is possible, in agreement with the Secretariat, to make an oral statement on record at COMCO's premises (*see box, The regulatory authority*). See also *Question 16, Domestic submissions and foreign discovery*.

It is not possible to submit a marker by phone or orally with the Secretariat's search team on-site during a search. However, it is possible to submit a marker by making an oral statement on record. This is possible only in agreement with the head of the search team who determines the modalities and co-ordinates with the head of operations of the Secretariat. This procedure may be slower than a submission by e-mail or fax.

Short-form applications

Not applicable.

10. What are the applicable procedures and timetable?

The date and time of a marker determines the rank of a leniency application, so long as a leniency application is subsequently submitted that satisfies the requirements to grant complete or partial immunity from the sanction. The submission of a marker is not a condition for the submission of a leniency application, which may also be submitted directly.

The Secretariat of the Competition Commission (Secretariat) acknowledges receipt of the leniency application without delay, indicating the date and time of the receipt. For an oral leniency application the Secretariat may refrain from handing over the acknowledgement and allow the undertaking to consult it on-site (procedure without correspondence).

If the Secretariat finds that the leniency application is incomplete, it informs the undertaking of any additional information the undertaking must submit and sets a deadline for this purpose. If, after a final deadline, the leniency application is not completed, the undertaking loses its position in the ranking. It will then, in the order of the markers, be determined whether another leniency applicant is in a position, as the first, to submit a complete leniency application.

As soon as the Secretariat determines that the leniency application fulfils the requirements for full immunity from a sanction, it informs the undertaking (in practice, this often takes considerable time). Subsequently received leniency applications are reviewed only after a decision concerning the first leniency application has been reached.

If the Secretariat decides that the leniency applicant qualifies for full immunity, COMCO (which has sole authority to impose fines) is bound by the statement of the Secretariat. This means that COMCO can only deviate from this assurance when it issues its final decision if it subsequently becomes aware of additional circumstances that disqualify an undertaking from leniency.

WITHDRAWAL OF LENIENCY

11. In what circumstances and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants?

Before the Competition Commission's (COMCO's) final decision

The first leniency applicant may lose its position in the ranking if either:

- The first leniency application is deemed incomplete by the Secretariat of the Competition Commission (Secretariat).
- The leniency applicant did not admit enough or contested certain facts and assumptions (such as the existence of an agreement under Article 4(1) of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act)).

It will then be determined, in the order of the markers, whether another leniency applicant, as the new first applicant, is in a position to submit a complete leniency application.

After COMCO's final decision

COMCO may withdraw immunity from a sanction previously granted to a leniency applicant if the applicant appeals a decision and (necessarily) contests certain facts and assumptions (such as the existence of an agreement under Article 4(1) of the Cartel Act). There is no legal certainty on the question of what a leniency applicant must admit and may not contest (*see Question 9*).

SCOPE OF PROTECTION

12. What is the scope of leniency protection after it has been granted?

As a rule, leniency applies insofar as the infringing activities are exclusively revealed in information provided by the leniency applicant to the Secretariat of the Competition Commission (Secretariat). It also, however, applies where the authority collects further evidence of the same infringing activities. The question whether an undertaking qualifies for full or partial immunity or what will be the amount of the reduction of a sanction may depend on which information was submitted by the undertaking and which information was collected by the Secretariat.

Leniency protection only applies to the particular infringement specified in an application. If during the investigation for that infringement the Secretariat discovers a second infringement, the second infringement cannot be protected under the original application; a separate application must be submitted.

13. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it is the first to disclose restrictive agreements and practices in another market (leniency plus)?

Where an undertaking provides information to the Secretariat of the Competition Commission (Secretariat) and the Competition Commission (COMCO) about other hard-core restrictions within the meaning of Article 5(3) and (4) of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) and these hard-core restrictions were unknown to the Secretariat and COMCO at the time of denunciation, the undertaking may benefit from a reduction of up to 80% (instead of up to 50% if it did not go in first) in the first proceeding (amnesty plus).

14. Does the grant of leniency affect a third party's ability to bring a follow-on damages action against a leniency applicant?

There is no obvious reason why the grant of leniency should affect a third party's ability to bring a follow-on damages action against a leniency applicant as the leniency programme does not affect the civil consequences of a competition law infringement. However, to the author's knowledge the question has not yet been addressed by Swiss courts.

COMCO decisions are not binding on civil courts. Civil courts may tend to follow COMCO's opinion so that a COMCO decision or an appellate decision may as a rule be expected to facilitate follow-on claims. However, it rests with the civil court to legally assess the evidence produced by the parties.

CONFIDENTIALITY AND DISCLOSURE

15. What are the rules relating to confidentiality during a leniency application?

Identity disclosure

The Secretariat of the Competition Commission (Secretariat) treats the identity of leniency applicants as confidential. However, the identity of leniency applicants will be disclosed in the course of the access to the file (*see below, Information disclosure*) and if an undertaking waives its right to confidentiality, for example by publicly announcing that it submitted a leniency application. The Secretariat normally informs the public in a media release, which is

also published on its website, that one or several leniency applications have been submitted during an investigation (without disclosing the identity of the applicants).

It cannot be excluded that, particularly in investigations with a small number of parties, conclusions may be drawn on the identity of leniency applicants earlier in the proceeding.

Information disclosure

The Secretariat maintains a separate file for the information and evidence submitted with the leniency application, which is independent from the other case files. Access to the physical and electronic documents of the file of the leniency application is limited to the members of the Secretariat's case team.

As a rule, access to the leniency application file is only granted when the Secretariat sends its draft order (similar to the statement of objections) to the parties for comment. As an exception, access to the file may be granted earlier, particularly if an amicable settlement is being negotiated. Business secrets must be protected (*see for general guidance the Explanatory Note "Business Secrets" of 30 March 2008; available in German*

(www.weko.admin.ch/dokumentation/01007/index.html?lang=de), French

(www.weko.admin.ch/dokumentation/01007/index.html?lang=fr) and Italian

(www.weko.admin.ch/dokumentation/01007/index.html?lang=it).

When granting access to the file during the proceeding, the Secretariat must balance the competing interests of the parties' right to effective defence and of the public in preserving the leniency programme as well as of the leniency applicant in keeping the information and the documents confidential. The Secretariat observes the following principles and distinguishes between the leniency application itself (corporate statement) and its annexes (that is, pre-existing evidence) (*Explanatory Note and Form of the Secretariat on Leniency Programme*):

- Access to the leniency application file is allowed exclusively at the premises of the Secretariat, independently of the form (written or oral) of the leniency application. Any form of copying (scans, photos and so on) is prohibited. This applies as a general rule to the leniency applicant as well as to the other parties of the proceedings. However, it is permitted to take notes or to use a dictation device during access to the file.
- Access to the annexes of the leniency application (that is, pre-existing evidence) depends on their volume. Access usually takes place at the Competition Commission's (COMCO's) premises. However, if the volume is such that an on-site consultation is unreasonable for the parties and if this prevents them from exercising their right to effective defence, copies will be provided to the parties to the investigation (usually in electronic form), with restrictions as to the extent of their use. This means the copies provided to the parties may be used exclusively for the preparation of the defence in the ongoing administrative cartel proceeding before COMCO and its Secretariat but not in civil, criminal and foreign procedures.

The leniency applicant can also indicate that the leniency application was filed voluntarily. The applicant can ask the Secretariat that it undertake to keep the application confidential under the Act on Freedom of Information in the Administration so that the leniency application need not be made accessible on the grounds of this Act.

Confidentiality requests

It is possible to initially file a leniency application anonymously. However, the leniency applicant must subsequently reveal its identity in an early phase of the proceeding (*see above, Identity disclosure and Information disclosure*) (*see also Question 9, Informal/confidential guidance*). In particular, business secrets and personal data must be protected.

16. What are the rules concerning disclosure of statements made in support of a leniency application?

Domestic submissions and domestic discovery

In general, there is no exchange of information between the Competition Commission (COMCO) and the Secretariat of the Competition Commission (Secretariat), and the Swiss civil courts. Discovery orders are not available under Swiss law. However, third party claimants may seek to obtain information and documents in particular as follows:

- Third parties may request participation in the investigation within 30 days from the publication of the opening of an investigation by the Secretariat. The publication of the opening contains an invitation to third parties to come forward within 30 days if they wish to participate in the investigation. As a party to the proceeding, the third party has access to the file; however, subject to important limitations (*see Question 15*).
- Third parties may request access to information and documents based on the Act on Freedom of Information in the Administration (AFIA). However, leniency applicants (and to a certain extent also other parties) may indicate that the information was filed voluntarily and ask that it be kept confidential under the AFIA.
- Third party claimants can, in proceedings before a civil court, request from the court that it order the counterparty or third parties to issue documents that are in their possession. However, this is subject to several conditions. Additionally, there are no sanctions and no coercive measures against the counterparty, but only against third parties, if they do not comply with the order.

Domestic submissions and foreign discovery

COMCO and the Secretariat have introduced a number of measures to protect leniency applicants. These measures include that the leniency application can be put on record orally at the premises of COMCO (oral leniency application). The reporting undertaking must provide the necessary man-power resources for the recording. The reporting undertaking may use the IT equipment of the Secretariat for the recording. In addition to oral leniency applications, paperless proceedings and restricted access to the files are measures introduced by COMCO and the Secretariat. However, these measures have not been tested in court to date.

See also *Question 15* and *17*.

Foreign submissions and domestic discovery

Discovery orders are not available under Swiss law. However, third party claimants in proceedings before a civil court can seek to obtain information, and documents in particular, by requesting from the court that it order the counterparty or third parties to issue documents that are in their possession. However, this is subject to several conditions. In addition, there are no sanctions and no coercive measures against the counterparty, but only against third parties, if they do not comply with the order.

Additionally, as a rule, the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters concluded on 18 March 1970 (Hague Evidence Convention) allows judicial authorities in a contracting state to obtain evidence from parties domiciled abroad, or to perform some other judicial act. The request can be through a letter of request addressed to a central authority designated by the other contracting state (letter rogatory).

See also *Question 17*.

INTER-AGENCY CO-OPERATION

17. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?

A co-operation agreement on competition between Switzerland and the EU was enacted on 1 December 2014. The co-operation agreement is a second-generation agreement. Information may be exchanged between COMCO and the European Commission even if there is no consent of the undertaking concerned provided that:

- Both competition authorities are investigating the same or related conduct or transaction.
- This conduct or transaction is also unlawful under Swiss law.

However, new provisions in the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) provide, among others, that the exchange of information or documents is not permitted if the information was made available in the context of a leniency or settlement procedure unless the leniency applicant has given its consent and if the data is used or made available by the foreign competition authority in criminal or civil proceedings. COMCO and the Secretariat must notify the undertaking concerned and invite it to state its views before transmitting the data to the foreign competition authority.

Apart from the co-operation agreement between Switzerland and the EU, there are currently no relevant agreements in force on mutual administrative assistance between Switzerland and other countries on competition, with two exceptions:

- Bilateral air services agreement between Switzerland and the EU.
- Bilateral trade agreement between Switzerland and Japan.

In this context, COMCO has successfully based requests on the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters concluded on 18 March 1970 (Hague Evidence Convention) to obtain information from parties domiciled in a foreign jurisdiction (France). The Hague Evidence Convention allows judicial authorities in a contracting state, by means of a letter of request to be addressed to a central authority designated by the other contracting state (letter rogatory), to obtain evidence, or to perform some other judicial act.

COMCO's case-specific co-operation with other competition authorities will currently primarily consist of co-operation with the European Commission.

PROPOSALS FOR REFORM

18. Are there any proposals for reform?

A proposed revision of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) was rejected in Parliament in September 2014. It is yet unclear which elements of the revision that was rejected in Parliament as a package will again be taken up separately in a future revision. A new motion has already been submitted in Parliament. Under this motion a new concept of relatively market dominant undertakings would be introduced in the Cartel Act with the aim that suppliers outside Switzerland would be forced to supply customers (undertakings) in Switzerland at fair conditions.

Currently, relevant developments are emerging from the practice of COMCO and of the courts. These developments include, among others, the issue of whether hard-core restrictions are per se

prohibitions or whether a significant effect on competition is required, the conditions for a leniency application (*see Question 9*) and access to the file (*see Question 15*).

ONLINE RESOURCES

Swiss Competition Commission (COMCO)

W www.weko.admin.ch

Description. This is the official website of COMCO where original language text of the legislation, case law, explanatory notes and forms referred to in this article, press releases, information and contact details of COMCO can be found. The website is in the three official languages, that is German, French and Italian. Legislation is available in all three languages; case law is provided only in one of these languages. Unofficial English-language translations can be obtained for part of the legislation and some explanatory notes.

THE REGULATORY AUTHORITY

Swiss Competition Commission (COMCO)

Head. Professor Vincent Martenet (President of COMCO) and Rafael Corazza (Director of the Secretariat)

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T +41 58 462 20 40

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E weko@weko.admin.ch (or for leniency applications: leniency@comco.admin.ch)

W www.weko.admin.ch

Responsibilities. COMCO and the Secretariat have primary responsibility for enforcing the Cartel Act. COMCO is the deciding body in cartel matters, while the Secretariat conducts the investigations.

Person/department to apply to. Leniency applications must be submitted to the Secretariat.

Procedure for obtaining application documents. The Explanatory Note and Form of the Secretariat on Leniency Programme is available on COMCO's website (*see above, Contact details*).

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Publications. Publications and speaking engagements, see www.nkf.ch/en/people/birkhaeuser-nicolas.php.