The International Comparative Legal Guide to:

Cartels & Leniency 2016

9th Edition

A practical cross-border insight into cartels and leniency

Published by Global Legal Group, in association with CDR, with contributions from:

Advokatfirmaet Wiersholm AS
Affleck Greene McMurtry LLP
AGON PARTNERS
Anjarwalla & Khanna Advocates
Barnes & Thornburg LLP
Bloomfield Law Practice
Borenius Attorneys Ltd
Cárdenas & Cárdenas Abogados
CLK Avocats
Crowell & Moring
Debarliev, Darneski & Kelesoska, Attorneys at Law
DLA Piper Nederland N.V.
Drew & Napier LLC
ELIG, Attorneys-At-Law
Gecić | Law
Gjika & Associates Attorneys at Law
INFRALEX
Keane Vgenopoulou & Associates LLC
Khaitan & Co
King & Wood Mallesons
Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, R.L.
Nagashima Ohno & Tsunematsu
Odvetniška pisarna Soršak d.o.o.
Pachiu and Associates
Preslmayr Rechtsanwälte OG
Skadden, Arps, Slate, Meagher & Flom LLP
Sysouev, Bondar, Khrapoutski
Wragge Lawrence Graham & Co LLP
General Chapters:


2. Competition ‘Collective Proceedings’ in the UK – a New Class of Action – Bernardine Adkins, Wragge Lawrence Graham & Co LLP

Country Question and Answer Chapters:

3. Albania
   Gjika & Associates Attorneys at Law: Oltion Toro & Silvi Tola

4. Australia
   King & Wood Mallesons: Sharon Henrick & Wayne Leach

5. Austria
   Preslmayr Rechtsanwälte OG: Dieter Hauck & Esther Sowka-Hold

6. Belarus
   Sysouev, Bondar, Khrapoutski: Alexander Bondar & Karyna Loban

7. Belgium
   Crowell & Moring: Thomas De Meese

8. Canada
   Affleck Greene McMurtry LLP: W. Michael G. Osborne & Michael Binetti

9. China
   King & Wood Mallesons: Susan Ning & Hazel Yin

10. Colombia
    Cárdenas & Cárdenas Abogados: Alberto Zuleta-Londoño & Ximenia Zuleta-Londoño

11. Cyprus
    Keane Vgenopoulos & Associates LLC: Thomas Keane & Christina Vgenopolou

12. European Union
    King & Wood Mallesons: Simon Holmes & Sarah Persky

13. Finland
    Borenius Attorneys Ltd: Ilkka Aalto-Setälä & Eeva-Riitta Siivonen

14. France
    King & Wood Mallesons: Marc Lévy & Natasha Tardif

15. Germany
    King & Wood Mallesons: Tilman Siebert & Dr. Michaela Westrup

16. Hong Kong
    King & Wood Mallesons: Martyn Huckerby & Edmund Wan

17. India
    Khaitan & Co: Manas Kumar Chaudhuri & Aditi Gopalakrishnan

18. Italy
    King & Wood Mallesons: Riccardo Croce & Elisa Baretta

19. Ivory Coast
    CLK Avocats: Lassiney Kathann Camara & Elói Kouakou Yao

20. Japan
    Nagashima Ohno & Tsunematsu: Eriko Watanabe

21. Kenya
    Anjarwalla & Khanna Advocates: Anne Kiunuhe & Ciru Longden

22. Macedonia
    Debarliev, Damaski & Kelesoska, Attorneys at Law: Dragan Damaski & Jasmina Ilieva Jovanovik

23. Netherlands
    DLA Piper Nederland N.V.: Martijn van Wannoo & Firda Pasaribu

24. Nigeria
    Bloomfield Law Practice: Bode Adegoke & Busayo Adeadeji

25. Norway
    Advokatfirmaet Wiersholm AS: Anders Ryssdal & Monica Hilseth-Hartwig

26. Portugal

27. Romania
    Pachiu and Associates: Remus Ene & Adelina Somoiag

28. Russia
    INFRALEX: Artur Rokhlin & Victor Fadeev

29. Serbia
    Gecić | Law: Bogdan Gecić & Marija Papić

30. Singapore
    Drew & Napier LLC: Lim Chong Kin & Scott Clements

31. Slovenia
    Odvetniška pisarna Soršak, Vagaja in odvetniki, d.o.o.: Jani Sorsak

32. Spain
    King & Wood Mallesons: Ramón García-Gallardo & Manuel Bermúdez Caballero

33. Switzerland
    AGON PARTNERS: Patrick L. Krauskopf & Fabio Babey

34. Turkey
    ELIG, Attorneys-At-Law: Gönenç Gürkaynak & Öznur İnanılır

35. United Kingdom
    King & Wood Mallesons: Simon Holmes & Philipp Girardet

36. USA
    Barnes & Thornburg LLP: Kendall Millard & Brian R. Weir-Harden

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer
This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.
Chapter 33

Switzerland

AGON PARTNERS

1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

Legal Basis. The heart of the Swiss Competition law is the Federal Act on Cartels and other Restraints of Competition (Cartel Act, CartA) of 6 October 1995.

- The CartA has been shaped through one major revision in 2003, leading to more efficient prosecution (e.g. the Dawn Raid) and financial sanctions.
- The Ordinance on Sanctions imposed for Unlawful Restraints of Competition (Cartel Act Sanctions Ordinance, CASO) set the general i.e. rules for calculating the fines and for the Leniency Programme.


Civil/Administrative Nature. The CartA is designed as a civil-administrative bill. However, case law shows that fines imposed by the Competition Commission Comco (Article 49a CartA) are sanctions of a criminal nature. Courts are therefore applying partially and in a selective way, guarantees of a criminal investigation.

1.2 What are the specific substantive provisions for the cartel prohibition?

The substantive provisions are to be divided into three pillars:
1st pillar: Agreements (Articles 5, 6 CartA).
2nd pillar: Abuse of dominance (Article 7 CartA).
3rd pillar: Merger control (Articles 9, 10 CartA).

The first and second pillars are ex post regulations: undertakings have to give notice of their planned merger, thus enabling Comco to assess in advance the effects of the merger on the market.

1.3 Who enforces the cartel prohibition?

The CartA is enforced either by Comco (public enforcement) or by the Civil Courts (private enforcement). The vast majority of the cases are enforced by Comco.

- Duty to Examine. Civil courts have to examine a case when it has been filed properly. In contrast, Comco has no obligation to take up all claims being filed. Although Comco is the only public authority to enforce competition law, its resources are too small to handle all of the cases.
- Damages. Parties who have suffered damages because of cartel activity obtain compensation only by bringing the case before a civil court. Fines imposed by Comco will be of benefit only to the treasury department.
- Costs. Parties filing a claim with Comco do not have to bear any costs for the procedure. In contrast, filing a claim with a civil court can lead to huge costs: the unsuccessful party not only has to bear the costs of the procedure, but it has also to compensate the winning party.
- Evidence. Comco has extensive investigative powers to tackle a cartel. On appeal, an administrative court will assess whether Comco had enough evidence to fine a company. In a civil procedure, the plaintiff has to present all of the evidence required in order to claim for damages. There is no pre-trial discovery.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Preliminary and informal investigation (Article 26 CartA). An investigation can be initiated by any third party, by an undertaking which is carrying out misconduct, or by Comco itself. At this stage, Comco’s Secretariat examines to see whether there is prima facie evidence of misconduct. If there is no sufficient indication of a violation of the CartA, Comco closes the case, usually with a short report (not a decision) about the market and the companies under scrutiny.

Formal Opening of Investigation (Article 27 CartA). If there are indications of an unlawful restraint of competition, Comco shall open a formal investigation, usually by carrying out a dawn raid on the premises of the companies being suspected of violating the CartA. The decision to open a formal investigation cannot be appealed.

Running the Investigation. Comco’s Secretariat – the fully staffed investigative authority – can collect all kinds of evidence, proceed to hearings and give experts the mandate to provide legal and economic opinions. An investigation usually takes between 18 and 36 months.

Decision. Based upon a motion from Comco’s Secretariat and defence materials and pleadings, Comco decides to either approve an amicable settlement or to impose measures and fines.

Appeal. Parties can file an appeal with the Federal Administrative Court against Comco’s ruling, right up to the Federal Supreme Court.
1.5 Are there any sector-specific offences or exemptions?

No. By law, there are no sector-specific offences or exemptions. Non-sector specific exemptions by law: Article 3 CartA, however, states some exceptions:

- Statutory provisions that do not allow for competition in a market for certain goods or services, take precedence over the provisions of the CartA.
- The CartA does not apply to effects on competition which result exclusively from legislation governing intellectual property.

Sector-specific offences in case law: Comco has set up sector-specific rules, such as those for the automotive sector.

Sector-specific exemptions in case law: According to Article 8 CartA, the Federal Council – as Switzerland’s federal government – may, on the basis of public interest, authorise an agreement which affects competition or authorise certain behaviour by dominant undertakings, even if Comco has already declared it to be unlawful.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

CartA applies to practices that have an effect within Switzerland, even if they originate in another country (Article 2 CartA). Thus, Switzerland’s Competition Law is based on the effects doctrine, and its geographic reach is wider than Swiss borders.

2 Investigative Powers

2.1 Summary of general investigatory powers.

<table>
<thead>
<tr>
<th>Investigatory power</th>
<th>Civil / administrative</th>
<th>Criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Order the production of specific documents or information</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Carry out compulsory interviews with individuals</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Carry out an unannounced search of business premises</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Carry out an unannounced search of residential premises</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>■ Right to ‘image’ computer hard drives using forensic IT tools</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>■ Right to retain original documents</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>■ Right to require an explanation of documents or information supplied</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>■ Right to secure premises overnight (e.g. by seal)</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

No structural separation between investigation and decision. Comco’s Secretariat is responsible for carrying out the investigations. Comco itself acts as the decision-making body. There are so-called “Chinese walls” between the two bodies. At the end of the day, both bodies constitute two sides of the same coin. Comco is involved in many ways in investigations. Thus, a dawn raid by the Secretariat requires the approval of Comco’s president.

Appeal heals procedural deficit. The blurred lines between the duties of the decision-making body and the investigatory body cannot be seen without demur, in connection with various procedural guarantees – namely – of Article 6 ECHR, as well as Article 14 UN Covenant II. A partly satisfactory argument is that rulings can be appealed by an independent body, namely, the Federal Administrative Court.

2.3 Are there general surveillance powers (e.g. bugging)?

The Swiss Competition Authorities do not have general surveillance powers.

2.4 Are there any other significant powers of investigation?

Concerning the prosecution of cross-border activities in competition law, the agreement between Switzerland and the European Union about cooperation in the application of their competition laws (CC 0.251.268.1) entered into force on 1 December 2014. This agreement enables the Swiss and the European Competition Authorities to notify each other and coordinate enforcement activities together, as well as to even exchange confidential information.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Ordering a dawn raid: At the request of the Secretariat, Comco’s presidency can order a dawn raid.

Criteria: To conduct a dawn raid, the following are required: (1) sufficient grounds for suspicion; (2) likelihood of finding evidence; (3) respect for the principle of proportionality; and (4) a correctly completed search warrant signed by a member of the Comco.

Conducting the dawn raid: The dawn raid itself is conducted by the Secretariat, and may encompass both business and residential premises.

Key points during a dawn raid:

- The authority does not have to wait for the arrival of legal advisors.
- The contact person for the authority is the highest-ranking person within the company.

2.6 Is in-house legal advice protected by the rules of privilege?

No. An in-house lawyer is seen as a regular employee. The prerequisite for such the existence of privilege is the independency of the legal undertaking providing advice.
2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

**Legal privilege.** The correspondence between an undertaking and its external lawyer is protected by the rules of privilege.

**Procedural guarantees.** As the criminal law nature of penalties imposed under competition law is usually upheld, defendants can rely on procedural guarantees (as seen under question 1.1).

**Sealing.** During a dawn raid, documents which are not covered by the search warrant (or are private) can be sealed by the company and a court decision is needed by Comco before such documents can be reviewed.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities’ approach to this changed, e.g. become stricter, recently?

**No general sanctions.** No, there is no general provision for obstruction of investigations.

**Selective sanctions in law.** CartA gives Comco the power to fine a company for not fully fulfilling its obligations to provide information or for failing to produce documents (Article 50 ss CartA).

**Selective sanctions in case law.** Comco has shown a growing tendency to punish companies for obstruction of an investigation when the time comes to calculate the amount of a fine.

### 3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

**Selective Breaches.** Fines can be imposed when companies participate in an unlawful agreement – only hard core restrictions – pursuant to Article 5 (para 3 and 4) and for the abuse of a dominant position in the sense of Article 7 CartA.

**Maximum Amount.** The maximum amount of fines is 10% of the (group) turnover that the undertaking achieved in Switzerland in the preceding three financial years. The amount of the fine is dependent upon the duration and severity of the infringement.

3.2 What are the sanctions for individuals?

**No general sanctions.** There are no sanctions for individuals regarding the original violation of competition law, nor prison sentences for individuals.

**Selective sanctions.** Sanctions for individuals are listed in Article 54 et seq. CartA. The sanctions may not exceed CHF 100,000 and result from the following:

- Wilful violations of decisions made by Comco or of amicable settlements made with Comco.
- Failure to fully comply with information requests.

3.3 Can fines be reduced on the basis of ‘financial hardship’ or ‘inability to pay’ grounds? If so, by how much?

There is no specific provision in the CartA which explicitly addresses that issue. In contrast – according to the principle of proportionality

- CASO states in Article 2(2) that Comco must take such criteria into account when determining the sanction.

3.4 What are the applicable limitation periods?

**No limitation period for investigation.** Comco is not precluded from investigating a cartel due to a limitation period.

**Limitation period for fines.** The limitation period for fines is derived from Article 49a (3)b CartA. Fines cannot be imposed if the restraint of competition has not been exercised for more than five years by the time an investigation is opened.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

**Fines (Article 49a CartA).** Such sanctions are always imposed against the company and not against the employees. Regarding the legal costs, the CartA does not provide a solution. Therefore, the companies are free to fund any legal costs for their employees.

**Selective sanctions for individuals (Article 54 CartA).** Those sanctions need to be paid by the convicted person individually.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

**No provisions in CartA.** The CartA does not provide such a respective regulation.

**Provisions in civil law (i.e. contractual labour law or torts).** Swiss law states that an employee can be held responsible for such damage.

### 4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The CartA provides a leniency programme (Amnesty and Amnesty+), which is stated in Article 49a(2) CartA.

Regarding Amnesty, the following should be taken into consideration (for Amnesty+ see question 4.6):

- Comco may grant full or partial immunity.
- The undertaking has to cooperate (fully) with the authority and help to reveal and remove the restraint of trade.
- Only “first-movers” may obtain full immunity.
- For full immunity, the undertaking must not be the ringleader of the cartel.

4.2 Is there a ‘marker’ system and, if so, what is required to obtain a marker?

Since only the first undertaking is eligible to benefit from full immunity, the Comco has to determine the chronological order of the submissions of the voluntary reports. Some key-aspects are the following:

- A voluntary report can only be submitted by one single undertaking and not by two undertakings together.
- A marker is the declaration of intention to submit a voluntary report, and therefore precedes the voluntary report.
- If a marker is not followed by a voluntary report, it is disregarded.
There are, however, no specific rules for whistle-blowers. Specific provisions in case law: Comco would do whatever it takes to grant anonymity to a whistle-blower.

### Plea Bargaining Arrangements

#### 6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities’ approach to settlements changed in recent years?

Article 29 CartA states that if the Secretariat considers a restraint of trade as being inadmissible, it may propose an amicable settlement. The settlement needs to fulfil the following requirements:
- to be in written form; and
- to be approved by Comco.

No appeal commitment: The Secretariat will not settle with those undertakings which are willing to lodge an appeal.

Framework agreement: Since 2014, Comco and parties have been concluding a framework agreement prior to the commencement of settlement discussions. The aim is to facilitate discussions without being exposed to the danger that something might be used against the parties in a procedure where settlement discussions have failed.

### Appeal Process

#### 7.1 What is the appeal process?

Appeals against decisions of the Secretariat (during the procedure) and against Comco (the final decision), can be made in first instance to the Federal Administrative Court and subsequently to the Federal Court if need be. There is a 30-day period during which an appeal is to be filed.

#### 7.2 Does an appeal suspend a company’s requirement to pay the fine?

Yes. An appeal generally has a suspensive effect, unless decided otherwise.

#### 7.3 Does the appeal process allow for the cross-examination of witnesses?

No. Swiss administrative law does not provide for the possibility of witnesses being cross-examined at any stage.

### Damages Actions

#### 8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for ‘follow on’ actions as opposed to ‘stand alone’ actions?

Public enforcement is paramount in Switzerland (95%). Private enforcement is still underdeveloped (5% of cases).

According to Article 12/13 CartA, the following points in civil proceedings have to be stressed:
- The possibility of an action for an injunction or compensation for damages exists.
8.6 Have there been any successful follow-on or stand-alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

As the number of civil trials is remarkably small, there are no exceptional decisions. Moreover, most of the civil trials end in a settlement and do not reach the public domain.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The last attempt to amend the CartA was turned down by the Swiss Parliament in September 2014. Some of the key themes of the amendment were:

- Establishing an independent competition authority, which would also have to apply to an independent Federal Court of Competition for a decision.
- The reduction of fines given the existence of a compliance programme.
- Facilitation of private enforcement, allowing consumers to sue, as well as allowing an interruption of the limitation period.

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

Since the Swiss Reserve (Swiss National Bank) gave up the fixed exchange rate “Swiss Franc – EURO” in early 2015, goods imported from abroad became cheaper by approximately 20% “overnight”. In order to have the currency-exchange benefits rapidly transferred to the Swiss consumers by the Swiss distributors, Comco has launched broad investigations into the retail markets. As of October 2015, there are no findings that “Vertical Restraint” hindered imports to Switzerland from the EU and it seems that consumers are fully benefitting from the new exchange rate.
Prof. Dr. Patrick L. Krauskopf is chairman of AGON Partners and head of the Center for Competition Law at the Zurich University. Prior to joining AGON, he was, inter alia, a law clerk with the Swiss Federal Supreme Court, both the deputy director and then the chief of international affairs with the Swiss Competition Commission (COMCO). He regularly lectures on contracts, torts and competition law at the Zurich University (ZHAW) and other universities. He is frequently an expert on competition law with WTO, UNCTAD, ICN and CUTS. During his mandate at COMCO, he led the revision of the Swiss Cartel Act 2003, the Ordinance on Fines and Leniency Program 2004, the Communication on Car Distribution (BER) 2002, and the Communication (BER) on Vertical Restraints 2007. He studied at the Universities of Fribourg and Berkeley (Master, 1991; PhD, 1999) and at Harvard Law School (LL.M., 2005). He is admitted to all Swiss Courts and also to the New York Bar.

Fabio Babey is the managing director at AGON Partners, the compliance officer of a dominant international company and a lecturer at the Zurich University (Center for Competition Law). He focuses upon competition law and compliance and speaks German, English, French, Spanish and Italian. He manages a series of events for young antitrust lawyers and economists in the field of competition law (“Debating Competition”) and is program manager of the course “CAS International Competition Law and Compliance”. He works for the Swiss Association for Compliance and Competition Law (ACCL) and organises the Event-Series Competition Law Update (CLU). Previously, he was the founder/managing director of Emeritus-Work GmbH, and doctoral candidate at the chair of Prof. Heinemann (University of Zürich).

AGON Partners is a law firm specialising in competition law. AGON Partners offers a wide array of essential services to anticipate, assess, and ultimately provide defence against various threats in this field. AGON's experienced specialists provide the entire spectrum of services from a single source. Apart from their expertise, they also possess an international network of executives in regulatory agencies dealing with competition matters worldwide, and have profound know-how about selecting the right procedural strategy.

Apart from providing competent legal advice and representation in civil and administrative competition proceedings, AGON also develops the accompanying communication and media strategies together with you, as well as political campaigns. Thanks to AGON's road-tested network and their experienced communication skills during proceedings, we provide a comprehensive process for promoting your reputation and credibility.

AGON is actively involved in shaping the scientific discourse about the application and development of Swiss competition law through both its research papers and presentations. We continually hand-on new insights gleaned from academia to our clients and the next generation of competition lawyers.
Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks