



# ICLG

The International Comparative Legal Guide to:

## **Cartels & Leniency 2019**

**12th Edition**

A practical cross-border insight into cartels and leniency

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# Switzerland

Patrick L. Krauskopf



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## 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 Swiss competition law is the Federal Act on Cartels and Other Restraints of Competition (Cartel Act, CartA) of October 6, 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) sets the general rules for calculating 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, procedural guarantees of a criminal investigation.

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

The substantive provision is Article 5 CartA.

#### 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 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 which enforces competition law, its resources are too limited to handle all of the cases.
- **Damages.** Parties who have suffered damages because of cartel activity can only obtain compensation by bringing the case before a civil court. Fines imposed by Comco will be of benefit only to the federal 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, the Federal 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 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 the investigation** (Article 27 CartA). If there are indications of an unlawful restraint of competition, Comco opens a formal investigation, usually by carrying out a dawn raid on the premises of the companies 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 proposal from the 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, based on 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 of General Investigatory Powers**

Investigatory Power	Civil/Administrative	Criminal
Can order the production of specific documents or information	Yes	No
Can carry out compulsory interviews with individuals	Yes	No
Can carry out an unannounced search of business premises	Yes	No
Can carry out an unannounced search of residential premises	Yes	No
■ Has the right to ‘image’ computer hard drives using forensic IT tools	Yes	No
■ Has the right to retain original documents	Yes	No
■ Has the right to require an explanation of documents or information supplied	Yes	No
■ Has the right to secure premises overnight (e.g. by seal)	Yes	No

**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 investigations in many ways. 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 investigative body cannot be seen without demur, in connection with various procedural guarantees of Article 6 ECHR. A partially satisfactory argument is that rulings can be appealed by an independent body, namely, the Federal Administrative Court, which has the power to take a new decision.

**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 December 1, 2014. This agreement enables the Swiss and the European Competition Authorities to notify each other and coordinate enforcement activities together, even to the extent of exchanging 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 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 being a regular employee. The prerequisite for holding that such a privilege exists is the independency of the legal undertaking providing the 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 before such documents can be reviewed by the Swiss Competition Authorities.

### 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 the obstruction of investigations.

**Selective sanctions in law.** The 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 the 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 where hard-core restrictions are involved – as mentioned in Article 5, para 3 and 4 CartA (and for the abuse of a dominant position within the meaning 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 (e.g. criminal sanctions, director disqualification)?

**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:

- Wilful violations of decisions made by Comco or of amicable settlements made with Comco (Article 54 CartA: maximum fine of CHF 100,000).
- Wilful failure to fully comply with information requests (Article 55 CartA: maximum fine of CHF 20,000).

### 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 this issue. However – 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 having expired.

**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 the 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.

### 3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

**In general:** Yes, a parent company can be liable for the cartel conduct of a subsidiary even if it is not itself involved in the cartel.

**Requirement:** If the parent company effectively controls its subsidiary and effectively exercises that option so that the group companies (subsidiaries) are unable to conduct themselves independently of the parent company, the group is considered as a single economic entity. In such cases, the parent company can be liable for the cartel conduct of a subsidiary even if it is not itself involved in the cartel.

## 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 conditions are listed in CASO. 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?

Yes. Since only the first undertaking is eligible to benefit from full immunity, 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.
- A “marker for a voluntary report” is preferably sent by e-mail or fax (time issue).
- From the moment it applies for the marker, the undertaking has to cooperate fully.
- Comco provides detailed instructions on its website.

#### 4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

According to CASO, an application can be made orally by the Secretariat of Comco. The undertaking may also file the voluntary report by submitting anonymous information. The Secretariat then determines whether the information is enough for immunity and will set the time period within which the undertaking must disclose its identity.

#### 4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

To what extent?

- Access is restricted to other undertakings which are being investigated.
- Files are only available at Comco’s offices under the supervision of an officer.
- Information-gathering does not include copies of the file’s contents, but only the right to transcribe.
- Information is only given where a written commitment is made that such information shall only be used for defence purposes in Comco proceedings (which do not include private litigants). Recently, Comco now takes a decision to be sure that the parties respect these conditions.

For how long?

- A leniency applicant will be treated confidentially, at least until the investigation is officially opened.
- In some cases, confidentiality is maintained right until the moment the final decision is published.
- Comco does not disclose leniency documents to private litigants.

#### 4.5 At what point does the ‘continuous cooperation’ requirement cease to apply?

For full immunity, an undertaking must cooperate continuously during the entire investigation, until the decision is made.

In some instances, the immunity applicant has to cooperate until a decision is reached in related investigations.

#### 4.6 Is there a ‘leniency plus’ or ‘penalty plus’ policy?

Yes, Swiss Antitrust Law provides for “leniency plus”: An undertaking which reveals another anticompetitive violation

(2<sup>nd</sup> Cartel Case) can obtain a reduction of up to 80% (1<sup>st</sup> Cartel Case) (Article 12, para 3 CASO). This reduction is without prejudice to any possible full immunity or partial reduction of the sanction for the 2<sup>nd</sup> Cartel Case.

## 5 Whistle-blowing Procedures for Individuals

### 5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

No specific provisions in law. Anyone can report misconduct. 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.

## 6 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, the Secretariat and the parties will usually conclude 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. In February 2018 Comco’s Secretariat published a Notice on Amicable Settlement.

## 7 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, but only partially: an appeal in front of the first instance (Federal Administrative Court) generally has a suspensive effect, unless decided otherwise. If the Federal Administrative Court decides in favour of the authority, the sanction has to be paid even if the company appeals the decision in front of the second instance (Supreme Court).

### 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.

## 8 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.
- The possibility of nullity of contracts exists.
- The possibility of a follow-on or a stand-alone claim exists.
- Access to and gathering evidence can be difficult as no pre-trial discovery phase exists.
- The losing party bears the financial risk.

It is often easier to estimate the success of *follow-on claims*. However, the authority will not provide any evidence and the limitation period (one year) has to be respected.

### 8.2 Do your procedural rules allow for class-action or representative claims?

No. Swiss competition law does not provide an instrument of collective redress.

### 8.3 What are the applicable limitation periods?

Swiss competition law applies the limitation periods of the Swiss Code of Obligation (CO) for civil enforcement. According to Article 60 CO, the relative limitation period is one year, counting from knowledge of the damage, and in any case within 10 years of the passing of the damaging action.

### 8.4 Does the law recognise a "passing on" defence in civil damages claims?

Yes, cartel members can defend themselves against direct purchasers with the argument that the overprice has been passed on to the next market level. However, the cartel member bears the burden of proof in such a case.

### 8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The Federal Civil Procedural Code (CPC) defines the costs of civil trials in Article 95. The costs are composed of (1) processing costs (e.g. court fees), and (2) the legal fees of both parties. As the trial is held in a cantonal court, the amount of court fees varies from canton to canton and is also dependent upon the amount being disputed.

In general, it can be said that the losing party bears the financial risk, and therefore the costs for both parties. This rule may be allocated differently by the judge.

### 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 a restriction by object for "hard-core" cartels (price, quantity and territory).
- Introducing the SIEC test in merger control cases – in analogy to the EU system.
- 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.

On January 1, 2016, Comco adopted a revised Notice on the Assessment of Vertical Agreements in the Motor Vehicle Sector which basically mirrors the EU's BER. It replaces the Notice of 2002. The most significant changes are:

- Manufacturers now have the possibility of showing efficiency gains in all infringement cases.
- Manufacturers' obligation to conclude a contract with auto dealers in the aftersales market, provided the dealer fulfils all requirements set by the manufacturer, has been softened.

On May 22, 2017, Comco adopted a revised Notice on the Assessment of Vertical Agreements. It updates the Notice of 2010. The most significant changes are:

Vertical Agreements on prices (RPM) and absolute territorial protection are generally prohibited, unless they can be justified on grounds of economic efficiency.

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

The Swiss Federal (Supreme) Court (SC) rendered a landmark decision on June 28, 2016 regarding the significance of anticompetitive agreements under Swiss law (decision 2C\_180/2014). Gaba, the manufacturer of the toothpaste "Elmex", prohibited its Austrian licensee from selling "Elmex" products outside the assigned territory.

- The SC found for the first time that vertical agreements between manufacturers and resellers on RPM or absolute territorial protection allocations are generally prohibited unless they can be justified on grounds of economic efficiency.
- In a general assessment, the SC stated that in cases of horizontal and vertical "hard-core" agreements (on

prices, quantities and territory), a significant restriction of competition by object is held to exist merely by having such an agreement.

- The SC made it clear that Comco can impose fines (Article 49a, para 1 CartA) in all cases dealing with RPM or absolute territorial protection. From now on, Comco can impose fines

regardless of whether there is a suppression of competition (Article 5, para 3 and 4 CartA) or merely a significant restriction of competition (Article 5, para 1 CartA) at stake.

It can be assumed that Comco and parties will from now on focus more on (i) assessing whether an agreement is really given, and (ii) assessing the reasons for economic efficiency.



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