THE CARTELS AND LENIENCY REVIEW

ELEVENTH EDITION

Editors
John D Buretta and John Terzaken

THE LAWREVIEWS

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CONTENTS

PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcers. Some notable cartels have managed to remain intact for as long as a decade before being uncovered. Some may never see the light of day. However, for those that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from 23 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. Stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

This book serves as a useful resource for the local practitioner, as well as those faced with navigating the global regulatory thicket in international cartel investigations. The proliferation of cartel enforcement and associated leniency programmes continues to increase the number and degree of different procedural, substantive and enforcement practice demands on clients ensnared in investigations of international infringements. Counsel for these clients must manage the various burdens imposed by differing authorities, including by prioritising and sequencing responses to competing requests across jurisdictions, and evaluating which requests can be deferred or negotiated to avoid complicating matters in other jurisdictions. But these logistical challenges are only the beginning, as counsel must also be prepared to wrestle with competing standards among authorities on issues such as employee liability, confidentiality, privilege, privacy, document preservation and many others, as well as considering the collateral implications of the potential involvement of non-antitrust regulators.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced,

and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the 11th edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

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January 2023

Chapter 19

SWITZERLAND

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I ENFORCEMENT POLICIES AND GUIDANCE

In Switzerland, competition law is governed by the Federal Act on Cartels and other Restraints of Competition (the CartA). The legal framework for competition law is complemented by federal ordinances and the notices and communications of the Competition Commission (COMCO).

According to Articles 4(1) and 5 of the CartA unlawful restraints of competition include any agreements or concerted practices between at least two undertakings operating at the same or at a different market level (i.e., a horizontal or vertical agreement), that have or may have effects in Switzerland; and that significantly restrict effective competition and cannot be justified on grounds of economic efficiency, or that eliminate effective competition in a specific market.

Elimination of effective competition is presumed for agreements according to Article 5(3) and (4) of the CartA. These agreements, known as hardcore restrictions, include:

a horizontal agreements and concerted practices (i.e., between undertakings operating at the same market level):
- to directly or indirectly fix prices, including price elements;
- to limit the quantities of goods or services to be produced, purchased or supplied; and
- to allocate markets geographically or according to trading partners; and

b vertical agreements and concerted practices (i.e., between undertakings operating at different market levels):
- regarding fixed or minimum resale prices (resale price maintenance); and
- regarding the allocation of territories in distribution contracts to the extent that sales by other distributors into these territories are excluded (absolute territorial protection clauses).

The presumption that hardcore restrictions eliminate effective competition can be rebutted by demonstrating effective competition in the market. If effective competition is not eliminated, and the presumption can thus be rebutted, as well as in case of other agreements or concerted practices in accordance with Article 4(1) of the CartA, the competition authorities will examine in a first step whether the agreement in question significantly restricts competition. If so, the competition authorities examine in a second step whether the conduct in question is justified on grounds of economic efficiency. According to Federal Supreme Court precedent

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(in the *Gaba* decision), the first step of the assessment is based on the assumption that hardcore restrictions are per se significant and thus unlawful by their very nature (i.e., irrespective of the actual effects on the relevant market), unless the undertakings involved can demonstrate that the restrictions can be justified on grounds of economic efficiency. The strict stance taken by the Federal Supreme Court in the *Gaba* decision has been criticised, inter alia, because a justification on grounds of economic efficiency is rarely successful.

In a nutshell, an agreement or concerted practice is unlawful if it eliminates or significantly restricts competition and cannot be justified on grounds of economic efficiency. However, the Federal Council may authorise agreements that have been declared unlawful by the competent competition authority at the request of the undertakings involved if there are compelling public interests. In practice, exceptional authorisations on public interest grounds are of very minor importance.

COMCO enforces competition law in first instance administrative proceedings in Switzerland. It may impose fines in cases of competition law violations. Decisions are taken by a simple majority of the COMCO members present. Currently, COMCO consists of 12 members and is headed by a president and two vice presidents. The majority of its members are independent experts, typically professors of law or economics. A minority of members are representatives of business associations and consumer organisations. The president has the casting vote in the event of a tie.

COMCO is supported by a secretariat (the Secretariat). The Secretariat investigates suspected cartel conduct and submits the corresponding case files to COMCO for a decision to be taken. It also gives legal advice to businesses and public administrations on competition matters upon formal request. The Secretariat is organised into four divisions, which are each responsible for specific markets in Switzerland (i.e., product markets, services, infrastructure and construction). In addition, the resources division is responsible for administrative and technical tasks within the Secretariat. In total, the Secretariat has more than 70 employees with legal and economic expertise. It is headed by an executive board, consisting of a director, a deputy director, three vice directors and the head of the resources division.

In a government cartel investigation, the Secretariat can conduct preliminary investigations *ex officio*, based on a leniency application or in response to a complaint from businesses and consumers. If the Secretariat finds indications of an unlawful restraint of competition, it can request COMCO's approval to open a formal investigation. At the end of a formal investigation, the Secretariat summarises its findings in a draft decision. The parties subject to investigation may comment on the Secretariat's draft decision in writing. COMCO will decide the case on the basis of the Secretariat's draft decision and the parties' comments thereto, or it will conduct hearings and instruct the Secretariat to carry out additional investigative measures. Appeals against a COMCO decision may be filed before the Federal Administrative Court in St Gallen and subsequently the Federal Supreme Court in Lausanne.

II COOPERATION WITH OTHER JURISDICTIONS

Cooperation with the European Commission is governed by the Agreement between the European Union and the Swiss Confederation Concerning Cooperation on the Application of their Competition Laws (the Agreement on Cooperation), which entered into force on 1 December 2014. The Agreement on Cooperation creates the framework for enforcement cooperation between COMCO and the European Commission in the form of mutual

information and coordination of investigation steps, such as dawn raids. The Agreement on Cooperation also provides for the exchange of confidential information without the undertaking's consent, provided that the authorities investigate the same or related cartel conduct. However, restrictions may apply such as that disclosure of information obtained under leniency or after the beginning of settlement procedures requires the consent of the undertaking under investigation.

A similar cooperation agreement was signed between the Swiss Confederation and Germany on 1 November 2022. The agreement will allow COMCO and the German Federal Cartel Office to cooperate more closely in the future. In Switzerland, the agreement still needs to be approved by the Federal Assembly (the date of such approval is still uncertain at the time of writing).

Investigations in the air transport industry are governed by the Agreement between the European Community and the Swiss Confederation on Air Transport of 21 June 1999. The Agreement contains substantive provisions regarding anticompetitive agreements, decisions by associations and concerted practices, as well as abuses of dominance. It also provides for procedural rules, which create the basis for close cooperation within the scope of application of the Agreement. The relevant areas of responsibility are divided between COMCO and the European Commission. While COMCO is competent to investigate and decide on conduct relating to routes between Switzerland and third countries (i.e., countries outside the EU), the European Commission is responsible for routes between Switzerland and the EU.

Outside the scope of a formal cooperation agreement, Swiss authorities may only share confidential information with foreign authorities on the basis of a waiver of all undertakings concerned.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

The CartA has a broad scope of application. It applies not only to practices on Swiss territory but equally to practices abroad that have or may have an effect in Switzerland. This 'effects doctrine' is particularly important in relation to vertical agreements that may have an effect in Switzerland, even in cases where both supplier and distributor are located outside Switzerland. For example, obligations on distributors located in the European Economic Area (EEA) not to sell any products outside the EEA (to which Switzerland does not belong) fall within the scope of Swiss competition law. Such restrictions qualify as absolute territorial protection clauses in accordance with Article 5(4) of the CartA with the risk of substantial fines (see Section V).

While the jurisdiction for the enforcement of fines is limited to Switzerland, subsidiaries or branches domiciled in Switzerland can often be held responsible for anticompetitive conduct of foreign undertakings belonging to the same group of companies. In cases where there is no subsidiary or branch in Switzerland, the principle of territoriality can make effective enforcement of the CartA abroad difficult.

IV LENIENCY PROGRAMMES

The leniency programmes of the CartA and the Ordinance on Sanctions provide for complete or partial immunity from sanctions.

Based on Article 49a(2) of the CartA, COMCO typically waives a sanction in whole or in part if an undertaking assists in the discovery and elimination of a restraint of competition. However, only the first undertaking filing a leniency application is entitled to complete immunity from sanctions (amnesty). In addition, an undertaking seeking amnesty must also be the first to either:

a provide information or indications, or both, of an unlawful restraint of competition enabling COMCO to open a government cartel investigation (disclosure cooperation); or

b submit evidence enabling COMCO to find a hardcore restriction. This requires that no undertaking has already been granted conditional amnesty and that COMCO did not have sufficient evidence to find a competition law infringement at the time the leniency application was filed (identification cooperation).

Moreover, amnesty can be granted only if the undertaking:

a has not coerced any other undertaking into participating in the cartel conduct and has not played the instigating or leading role in the relevant cartel conduct (no ringleader);

b voluntarily submits to COMCO all available information and evidence relating to the cartel conduct that lies within its sphere of influence;

c continuously cooperates with COMCO throughout the procedure without restrictions and without delay; and

d ceases its participation in the cartel conduct upon submitting its leniency application or upon being ordered to do so by COMCO.

Markers define the order of precedence among undertakings filing a leniency application. A marker can be set in the form of an automatically generated email by completing and submitting an online form on COMCO's website (an 'e-marker'). A marker can also be delivered in person or by a representative, sent by mail or put on record at the Secretariat's premises. Setting a marker by phone or fax is not possible. The advantage of e-markers over other markers is that e-markers can be precisely timestamped. However, there will be no confirmation email for e-markers, meaning there will be neither a copy of the email created for and sent to the notifying undertaking nor an email with a confirmation of receipt. Undertakings may set any kind of marker at any time, especially during a dawn raid concerning the practice being investigated. Marker requirements are set out in COMCO's notice on leniency. A marker form, which is handed out at the beginning of a dawn raid, is included in the appendix of COMCO's notice on leniency.

Once an undertaking applies for a marker, the Secretariat confirms receipt of the marker indicating the date and time. The Secretariat then sets a deadline for the undertaking to submit the leniency application. In the leniency application, the undertaking must at least disclose its involvement in sanctionable conduct and explain what the reported conduct was intended to achieve and what effects it had on the market, without invalidating the information and evidence provided or generally denying possible negative effects on competition. However, case law has confirmed that leniency applicants have the right to question the legal interpretation of the facts and thus are not required to admit that a specific competition law provision has been infringed.

The Secretariat will inform each undertaking whether it considers there to be a disclosure or identification cooperation, notify the undertaking if any additional information

is needed and, in the event of an anonymous leniency application, set the time frame within which the undertaking must reveal its identity. At the end of the proceedings, COMCO will decide whether an undertaking meets the conditions for amnesty as specified above.

For undertakings that have filed a leniency application but are not granted amnesty, the sanction can be reduced by up to 50 per cent. An undertaking is eligible for a reduction if it has voluntarily cooperated in the proceedings and has ceased participating in the cartel conduct at the time the evidence is submitted. The reduction amounts to up to 80 per cent of the sanction if an undertaking voluntarily provides information or submits evidence on further hardcore restrictions that were not known to COMCO at the time of the submission (amnesty plus).

Furthermore, according to Article 49a(3)(a) of the CartA, an undertaking may notify the Secretariat of a restraint of competition before it has any effects on the market. If the Secretariat does not open a preliminary or formal investigation within five months of the undertaking submitting its notification, and if the undertaking does not engage in the conduct that may be considered unlawful within this period, sanctions for the notified conduct are waived. Currently, this 'notification procedure' is of little practical relevance as it does not adequately provide immediate legal certainty with respect to the admissibility of the particular conduct. The upcoming revision project of the CartA (see Section VIII) aims at strengthening the notification procedure. In particular, sanctions shall already be waived if the Secretariat does not open a preliminary or formal investigation within two months of the notification.

Finally, the Secretariat can propose a settlement concerning ways to eliminate an unlawful restraint of competition. A settlement is generally the most time-efficient and cost-efficient way to end an antitrust investigation. It is drafted by the Secretariat, proposed to the undertakings involved and approved by COMCO in a ruling. The Secretariat also submits a proposal for a possible sanction. The amount of the proposed sanction is not negotiable, but the Secretariat informs the undertakings of the range in which the sanction will lie before concluding the settlement. Settlements are binding, and violations are subject to criminal and administrative sanctions (see Section V).

V PENALTIES

Undertakings that participate in hardcore restrictions according to Article 5(3) and (4) of the CartA (see Section I) or abuse their dominant position in accordance with Article 7 of the CartA are subject to direct sanctions in the form of fines. According to Article 49a(1) of the CartA, such fine can reach up to 10 per cent of the group turnover that the undertaking achieved in Switzerland during the preceding three financial years.

The exact amount of a fine depends on the duration and severity of the competition law infringement and takes the presumed profit into account that resulted from the unlawful behaviour. The Ordinance on Sanctions and COMCO's explanatory communication on the Ordinance on Sanctions specify the calculation method of fines:

a In a first step, COMCO determines the base amount of the fine depending on the severity and nature of the violation. In the case of serious violations, the base amount of the fine will regularly be in the upper third of the maximum amount of the fine.

b In a second step, the base amount of the fine is increased depending on the duration of the competition law infringement.

c In a third step, the amount of the fine is increased or reduced according to aggravating or mitigating circumstances such as achieving a profit that is particularly high by objective standards, playing an instigating or leading role in the restraint of competition, or playing a strictly passive role in the restraint of competition. The fine can also be reduced based on leniency cooperation or settlement.

d Finally, COMCO must ensure that the fine is proportional to prevent a market exit of the undertaking. In any case, the fine is capped at 10 per cent of the group turnover that the undertaking achieved in Switzerland during the preceding three financial years.

The CartA provides for fines for other violations in cartel matters. Pursuant to Article 50 of the CartA, an undertaking that violates a settlement, an enforceable decision of COMCO or a decision by either the Federal Administrative Court or the Federal Supreme Court can be fined up to 10 per cent of the turnover it achieved in Switzerland during the preceding three financial years. In accordance with Article 52 of the CartA, an undertaking that fails to fully provide information or produce documents can be charged up to 100,000 Swiss francs.

The CartA does not provide for (direct) criminal sanctions against individuals who engage in competition law infringements. However, individuals acting for undertakings may face (indirect) criminal sanctions for other violations in competition law matters. In particular, according to Article 54 of the CartA, any person who wilfully violates a settlement decision, or any other enforceable decision or court judgment in cartel matters, can be fined up to 100,000 Swiss francs. Based on Article 55 of the CartA, individuals who wilfully fail to fully comply with the obligation to provide information during an investigation can be fined up to 20,000 Swiss francs. Individuals subject to fines include members of the board of directors, (de facto) managing directors and any other independent decision-makers, such as majority-controlling shareholders in an undertaking.

VI 'DAY ONE' RESPONSE

In a formal investigation, the Secretariat may order and conduct unannounced dawn raids and seize evidence. The Secretariat's search team has the right to search business premises and private residences. When seizing evidence, the search team has the right to inspect documents and electronic files. In relation to electronic files, all data that can be accessed from within the searched premises may be searched.

During a dawn raid, employees are obliged to passively endure the search and must not obstruct any investigative activity. Access to rooms, containers and IT systems that are covered by the search warrant must be granted. Refusal to do so may constitute an offence according to the Swiss Criminal Code and may be considered aggravating circumstances in relation to the sanction.

Employees have a general obligation to disclose information and documents upon specific request. However, there is no obligation to actively participate in the search unless a leniency application has been filed. In either case, employees may invoke the protection of attorney–client privilege to preclude an actual search of documents and data carriers by the search team. Attorney–client privilege applies to all documents produced by independent attorneys. Work products of in-house counsels are not covered by attorney–client privilege. In addition, objections to the search may be raised by asserting professional privilege, the

private nature of the data, or any other search prohibition to arrange for the sealing of documents and other records. The objection must be raised immediately or, at the latest, at the end of the search.

The first interrogations of employees, as well as executives, may take place on the same day of the dawn raid. In 2021, the Federal Supreme Court ruled that individuals who are formal or de facto executives of the undertaking at the time of the interrogation qualify as 'party representatives' and may remain silent in accordance with the principle of *nemo tenetur* if the undertaking they represent is subject to sanctions. They can also be represented by the undertaking's attorney. In contrast, former executives are interrogated as witnesses as they no longer have a direct interest in the outcome of the proceedings and a possible sanction. Such former executives, as well as current and former employees and other individuals who have allegedly committed or witnessed a competition law infringement, must be represented by a private attorney if they wish to seek legal advice. Any hearings or witness statements will be put on record. Individuals subject to interrogation have the right to read the record and comment on their statements on conclusion of the interrogation. While the undertakings concerned unquestionably have a right of access to such records, the competition authorities further clarified this right for potential civil plaintiffs in recent case law (see Section VIII).

Undertakings are advised to prepare for the possibility of a dawn raid. It is advisable to appoint an internal dawn raid response team consisting of a team leader (ideally a member of the in-house legal department), a member of management and an internal IT specialist. In addition, an external competition law specialist may be appointed as a contact person who is able to arrive on the premises on short notice in the event of a dawn raid. Furthermore, it is advisable to establish dawn raid guidelines. Generally, it is useful to have a short version for reception staff and a more comprehensive version for the internal dawn raid response team. Important topics to be addressed in the more comprehensive version of such guidelines are:

a the composition of the internal dawn raid response team and contact details of any external lawyers;

b description of the steps to be followed during a dawn raid, such as the immediate decision on whether a leniency application shall be filed;

c codes of conduct during a dawn raid, such as the principle that the officers conducting the dawn raid should be accompanied at all times and that the dawn raid should not be obstructed; and

d description of the areas of competence of the officers, such as an outline of the types of files that may be searched and seized.

As a further preparatory measure, the internal dawn raid response team and further employees affected by a dawn raid should be trained on how to behave and what steps to take during a dawn raid.

VII PRIVATE ENFORCEMENT

Third-party companies may request the following in civil proceedings if they are impeded from entering or competing in a market by an unlawful restraint of competition:

a the elimination of an unlawful restraint of competition;

b an injunction against an unlawful restraint of competition;

c damages; or

d the remittance of illicitly earned profits.

Claims for damages are limited to the damage incurred as a result of the unlawful restraint of competition. Under Swiss law, there are no punitive damages.

If the admissibility of a restraint of competition is in question, the civil court must submit the case to COMCO for an expert opinion. Although the civil court is not bound by COMCO's opinion, it will generally not deviate from the expert opinion or any previous decisions in this matter.

Civil proceedings are rare in Switzerland. One reason for this is that the court and legal fees incurred in such proceedings are borne by the unsuccessful party. Another reason is that the claimant bears the burden of proof but often has no access to the evidence, held mainly by the defendant. Also, the claimant must provide full proof of the competition law violation and any damage incurred as a result of this violation. Those affected by unlawful restraints of competition thus often prefer to submit a complaint to COMCO, even if this does not lead to the award of damages.

If the upcoming revision of the CartA is adopted as proposed by the Federal Council (see Section VIII), civil proceedings will be strengthened. The preliminary bill of the planned revision suggests giving customers legal standing in civil procedures and introducing a right to have a restraint of competition declared unlawful by civil courts. These elements are also likely to lead to an increase in requests for expert opinions from COMCO. The preliminary bill also proposes that the payment of damages be considered in the calculation of fines. This element is intended to create incentives for undertakings to compensate those affected by unlawful restraints of competition, especially since the fact of having made extraordinarily high profits from such unlawful restraints can lead to higher fines.

VIII CURRENT DEVELOPMENTS

i Ongoing and anticipated amendments and revisions

Partial revision of the CartA initiated

On 24 November 2021, the Federal Council issued a preliminary bill for a partial revision of the CartA. The revision process is still at an early stage. The public consultation on the preliminary bill ended on 11 March 2022. The results from the consultation period are currently being evaluated. Thereafter, the Federal Council will issue a proposal for the amendment of the CartA based on the results of the public consultation. The potential entry into force of the revised CartA is expected in 2024 at the earliest.

An important element of the revision pursuant to the preliminary bill concerns the substantive test in the Swiss merger control regime. The Federal Council plans to replace the current 'dominance-plus test' with the internationally well-known 'significant impediment to effective competition' (SIEC) test. While the turnover thresholds for notification shall remain unchanged, the SIEC test is likely to lead to more in-depth (Phase II) analyses of mergers and might also lead to more mergers being blocked or cleared subject to conditions. This part of the proposed revision will not directly affect the statutory framework for cartels and leniency. However, the preliminary bill also contains proposals to strengthen civil competition law procedures (see Section VII) and to improve the notification procedure (see Section IV). These two elements are likely to reduce the barriers to litigating competition law claims in civil courts and notifying restraints of competition to COMCO, which may eventually influence the number of administrative proceedings and leniency applications. Further, the preliminary bill includes two elements adopted by Parliament from a motion submitted by Jean-René

Fournier in 2016.[2] The first element concerns the introduction of regulatory deadlines, on a 'comply or explain' basis, to speed up administrative proceedings and to limit the duration of such proceedings to five years. The second element concerns the introduction of party compensation for legal fees for all proceedings before COMCO in which the investigated undertakings prevail. These two elements will be of general importance for all competition law proceedings.

The proposed revision of the CartA also considers the 'Motion Français',[3] submitted by Olivier Français in 2018, which suggests abandoning the strict stance taken by the Federal Supreme Court in the *Gaba* decision (see Section I). According to the Motion Français, instead of assuming the per se significance of certain hardcore restrictions, both qualitative and quantitative effects on competition shall be considered in each individual case. Although the Federal Council rejected the requested amendment, the motion was accepted by Parliament and now forms part of the preliminary bill.

Introduction of the concept of relative market power

As of 1 January 2022, new provisions in the CartA on companies with 'relative market power' entered into force. The newly adopted concept of relative market power applies both to companies abroad that supply goods or services to Swiss customers and to companies domiciled in Switzerland. A company may have relative market power if another company is dependent on it with respect to the supply of or demand for certain products or services because of a lack of sufficient alternative sources or business partners. This may be the case for 'must-stock' products and in the case of lock-in effects. In most other cases, the assessment will be difficult. Unlike the concept of market dominance, relative market power does not relate to a general market position of an undertaking, but rather always concerns a specific bilateral relationship between two undertakings. In addition, the scope of the concept of relative market power is broad. Companies with relative market power will be subject to the abuse of dominance regime of the CartA. However, there will be no sanctions for first-time infringements. Sanctions in the form of fines will only be levied in cases of repeated abuses of relative market power.

Also as of 1 January 2022, a new type of abuse was adopted, which applies to both dominant undertakings and to undertakings with relative market power. It introduces a right for Swiss companies to purchase goods and services under certain conditions at the same prices and customary conditions that apply abroad, which are typically more favourable than the conditions offered in Switzerland. It is uncertain whether this obligation also implies a 'most-favoured' requirement.

Revision of COMCO's Verticals Notice and Explanatory Note

In response to the amended European Vertical Block Exemption Regulation (EU-VBER) and Vertical Guidelines, COMCO has revised its Verticals Notice and Explanatory Note on vertical restraints in the course of 2022. The revised Verticals Notice and Explanatory Note entered into force on 1 January 2023.

The revised Verticals Notice and the Explanatory Note largely adopt the changes implemented in the new EU-VBER. However, they differ from the EU-VBER in a few

2 Motion 16.4094.

3 Motion 18.4282.

points that are mostly based on specific Swiss case law, also known as 'Swiss finishes'. For example, the Explanatory Note states that, in accordance with the Federal Administrative Court in the *Nikon* case, an obligation of a Swiss distributor to buy the contractual products only in Switzerland qualifies as an indirect absolute territorial protection clause which may lead to high fines. Further, the Explanatory Note explicitly refers to the Federal Supreme Court decision in the *Flammarion* case (see Section VIII.ii).

ii Selected developments relating to cartels

The covid-19 pandemic did not have a major impact on the competition law landscape and practice in Switzerland. On the contrary, COMCO issued a statement in March 2020 in which it pointed out that competition law would remain fully applicable during the crisis.

A focus on combating restrictions of parallel and direct imports into Switzerland has constituted an important practice area in COMCO and court decisions in recent years. Leading cases such as the 2016 *Gaba* decision of the Federal Supreme Court have had a major impact on Swiss competition law practice (see Section I). As a further development of the *Gaba* case law and contrary to the general strict stance of the Federal Supreme Court, the Secretariat considered that horizontal price and volume agreements of purchasing cooperations were not per se significant and assessed such agreements on the basis of qualitative and quantitative criteria in a preliminary clarification in 2020. Most recently, and in the context of an international purchasing cooperation, however, the Secretariat adopted the position that this did not apply to agreements on reductions of volume and delistings. According to the Secretariat, such agreements remain per se significant and subject only to justification on grounds of efficiency. Further developments in this context are soon to be expected as COMCO currently is investigating whether a purchasing cooperation via a third party (*Markant*), possibly combined with threats of collective delistings, is permissible under the CartA.

In December 2022, COMCO opened a preliminary investigation relating to alleged exchanges of information regarding salaries among a large number of Swiss banks. It is the first time that COMCO analyses possible labour market agreements which may fall within the scope of the CartA.

Combating bid-rigging and collusion in procurement cases has continued to be an important area of COMCO's activities. In this context, COMCO has recently published three decisions on questions of access to documents and disclosure of procedural files in the *See-Gaster* and *Engadin I* cases. COMCO's decisions follow the decision of the Federal Supreme Court in a different case in 2021 that neither a competition law violation nor the legal force of the sanction order is a prerequisite for the right to access procedural files. At the outset, procurement agencies of various cantons and the Rhaetian Railway requested access to procedural files relating to not yet legally binding sanction decisions. COMCO considered that the files of leniency applications were confidential, unless the files were already collected by the authorities during the investigation. Accordingly, COMCO denied the procurement agencies' request to access files submitted with the leniency application, while affirming their right to access other files. With this distinction, COMCO seems to attach importance to the leniency programme in Switzerland and does not want to diminish it by an overly generous right of potential plaintiffs to access leniency applications and files submitted with the leniency application. At the same time, COMCO does not fully protect leniency applicants against private enforcement but rather appears to promote private enforcement by facilitating access to information.

In 2021 and 2022, the Federal Supreme Court issued various decisions concerning the restriction of parallel imports of French-language books into Switzerland. The *Flammarion* and the *Dargaud* cases appear particularly relevant in the present context. In the *Flammarion* case, the Federal Supreme Court distinguished between books published by the Flammarion Group, for which it was the 'manufacturer', and books published by other publishers, for which Flammarion acted as a 'supplier'. According to the Federal Supreme Court, restrictions of parallel imports, when undertaken by a 'manufacturer', do not automatically constitute an absolute territorial protection agreement in accordance with Article 5(4) CartA. Accordingly, 'manufacturers' can lawfully refer unsolicited orders from dealers or end customers from Switzerland to their wholesalers. The opposite holds true for 'suppliers' who are not themselves manufacturers. The Federal Supreme Court argued that an obligation of a 'supplier' who is not itself a 'manufacturer', not to conduct any passive sales into Switzerland qualifies as an absolute territorial protection according to Article 5(4) CartA which is per se unlawful (unless justified on economic efficiency grounds). This distinction between manufacturers on the one hand and suppliers on the other hand is another 'Swiss finish' deviating from EU competition law. In the *Dargaud* case, the Federal Supreme Court remanded the case to the lower court for reassessment of the fine for preventing parallel imports. During this procedure, the Federal Administrative Court in particular rejected the party statement of an excessively long duration of the proceedings of more than 13 years. While the court accepted that the reduction of a sanction because of an excessively long duration of proceedings is in principle possible, it reasoned that in the present case the length of proceedings was partly because of the complexity of the matter and the fact that the long duration of proceedings was claimed in the present proceedings for the first time. In sum, the court confirmed that the hurdles for a reduction of a sanction because of an overly long duration of proceedings are very high.

In 2021, the Federal Supreme Court rendered important decisions regarding resale price recommendations in three parallel proceedings against manufacturers of erectile dysfunction drugs that remain to be of high practical importance. The Federal Supreme Court ruled that the resale price recommendations furnished by the three manufacturers all qualified as unlawful resale price maintenance in accordance with Article 5(4) of the CartA, despite the absence of pressure or incentives from the manufacturers for the recipient pharmacies to comply with the recommended resale prices. One main factor in the Federal Supreme Court's decision was that the resale price recommendations were communicated to the recipient pharmacies electronically and on a regular basis via a database operated by a third party. In this way, the price recommendations were entered directly into the cash register systems of the recipient pharmacies as default prices. This led the majority of the recipient pharmacies to follow the recommended resale prices. Furthermore, the Federal Supreme Court considered that the manufacturers were pressured by some pharmacies to issue recommended resale prices, supporting the Court's reasoning of a concerted practice in restraint of competition. The decisions were rightfully criticised by legal commentators. Resale price recommendations should not be regarded as a problematic practice as long as the distributors are completely free to set their own resale prices and the manufacturer neither gives incentives nor exerts pressure on the distributors to enforce the recommended resale prices. The cases were remanded to the Federal Administrative Court for determination of the fines, which are expected to be substantial.

Appendix 1

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Monique Sturny is a partner at Walder Wyss. She advises companies on all aspects of competition law matters, assists them in merger control proceedings and represents them in proceedings before competition authorities and courts. She has extensive experience with respect to setting up distribution systems and negotiating complex cooperation agreements. She handles matters across a wide range of sectors, with a particular focus on the healthcare sector and with respect to legal issues relating to data and the digital economy. She regularly speaks and publishes in her fields of expertise.

Monique Sturny was educated at the University of Fribourg (*lic iur*, 2002, with special mentions for European law and bilingual German–French), the London School of Economics and Political Science (LLM in international business law, 2007) and the University of Berne (*Dr iur*, *summa cum laude*, 2013). In 2020, COMCO appointed Monique Sturny as non-governmental adviser to the International Competition Network (ICN) for the following three years. Monique Sturny is a co-founder and board member of W@CompetitionCH, a network connecting female competition law professionals in Switzerland. In addition, she co-chairs the Schulthess Juristische Medien AG conference on competition law and is a member of the editorial board of the *Swiss Journal for Competition Law*.

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