THE CARTELS AND LENIENCY REVIEW

NINTH EDITION

Editors
John Buretta and John Terzaken

THE LAWREVIEWS

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This article was first published in February 2021
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-763-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

A&L GOODBODY

ALLEN & GLEDHILL LLP

ANDERSON MŌRI & TOMOTSUNE

ASSEGAF HAMZAH & PARTNERS

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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 29 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 to 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 consider 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 29 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 ninth 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 2021

Chapter 25

SWITZERLAND

Monique Sturny and Michael Schmassmann[1]

I ENFORCEMENT POLICIES AND GUIDANCE

The Federal Act on Cartels and other Restraints of Competition (CartA) is the legal basis for competition law in Switzerland. Federal ordinances and the notices and communications of the Swiss Competition Commission (COMCO) supplement the CartA.

COMCO and the Secretariat of COMCO (the Secretariat) are the competent competition authorities for enforcing competition law in Switzerland. COMCO is the deciding body in the first instance taking decisions by a simple majority of its members present. Currently, COMCO consists of 12 members and is headed by a president and two vice presidents. The president has the casting vote in the event of a tie. The majority of members are independent experts, typically professors of law or economics. The minority of members are representatives of business associations and consumer organisations. In each case, the Secretariat conducts investigations and submits a draft decision to COMCO for consideration. Next, the parties subject to investigation can comment on the Secretariat's draft decision in writing. COMCO then returns a decision or decides to conduct hearings and to instruct the Secretariat to carry out additional investigative measures. The Secretariat is organised into four divisions, which are each responsible for specific markets (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 that are lawyers and economists. It is headed by an executive board, consisting of a director, a deputy director, three vice directors and the head of the Resources Division.

The Secretariat can conduct preliminary investigations *ex officio*, based on a leniency application or in response to a complaint from businesses and consumers. Typically, cases with substantial impact on competition are more likely to be reported and investigated. The Secretariat requests COMCO's approval to open a formal investigation if it finds indications of an unlawful restraint of competition. Restraints include any agreement or concerted practice:

a between at least two undertakings operating at the same or at different market level (i.e. horizontal or vertical agreement),

b that has actual or potential effects in Switzerland, and

c that has the object or effect to significantly restrict effective competition in a market for specific goods or services and cannot be justified on grounds of economic efficiency or that eliminates effective competition on a specific market.

1 Monique Sturny is a partner and Michael Schmassmann is an associate at Walder Wyss Ltd.

Agreements according to Article 5(3) and (4) CartA – hardcore restrictions – are presumed by law to lead to the elimination of effective competition. 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; 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 cartels eliminate effective competition can be rebutted by demonstrating effective competition in the market. Where effective competition is merely restricted rather than unlawfully eliminated, the competition authorities will examine in a first step whether the agreement 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 the Swiss Federal Supreme Court case law (in the *Gaba* decision), hardcore cartels are 'per se' significant and thus unlawful by their very nature (i.e., irrespective of the actual effects on the relevant market), unless the agreement can be justified on grounds of economic efficiency. The strict stance taken in the *Gaba* decision has raised criticism from scholars and also led to a motion in parliament for a revision of the CartA. Criticism builds on the already very broad interpretation of the notion of agreement or concerted practice and the fact that justification on economic efficiency grounds is very often futile.

If the competition authorities declare an agreement affecting competition unlawful because it eliminates or significantly restricts competition and cannot be justified on grounds of economic efficiency, the Federal Council may authorise the agreement at the request of the undertakings involved given compelling public interests. In practice, exceptional authorisations on public interest grounds are of very minor importance.

II COOPERATION WITH OTHER JURISDICTIONS

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 constitutes the framework for enforcement cooperation between the European Commission and Swiss competition authorities. The Agreement on Cooperation creates the basis for closer cooperation between COMCO and the European Commission in the form of mutual information and coordination of investigation steps, for example, dawn raids. As a second-generation cooperation agreement, the Agreement on Cooperation provides for the exchange of confidential information without the undertaking's consent subject to the condition, however, that the authorities investigate

the same or related conduct. Additional restrictions apply, such as, inter alia, that disclosure of information obtained under leniency or after the beginning of settlement procedures is only permissible with consent.

Furthermore, 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 on anticompetitive agreements, decisions of 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 competences between the European Commission and COMCO are divided. 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 (the effects doctrine). This is particularly important with respect to vertical agreements containing absolute territorial protection clauses prohibiting passive sales into Switzerland. These restrictions constitute a focus area of COMCO's practice. They fall within the scope of the CartA and qualify as hardcore restrictions, even though both supplier and distributor may be located outside of Switzerland.

In contrast, the jurisdiction to enforce is limited to Switzerland, and the principle of territoriality can make effective enforcement of the CartA abroad difficult. However, subsidiaries or branches domiciled in Switzerland can often be held responsible for anticompetitive conduct of foreign undertakings belonging to the same group of companies.

IV LENIENCY PROGRAMMES

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

Based on Article 49a (2) CartA, COMCO can waive 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 may be granted complete immunity from a sanction (amnesty). The order of precedence is defined by markers. As of recently, a marker can be sent in the form of an automatically generated email after completing and submitting an online form on COMCO's website (this is known as an e-marker). The time of receipt of the e-marker corresponds to the time of receipt of the email. However, there will be no confirmation email, meaning there will be neither a copy of the email created for and sent to the notifying undertaking nor will there be an email with a confirmation of receipt. In addition, it remains possible to deliver the marker in person or to have it delivered by a representative, to send it by mail or to put an oral statement on record at the Secretariat's premises. However, the receipt of these markers cannot be precisely timestamped. Setting a

marker by phone or fax is not possible. Undertakings may set a 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 the notice on leniency and provides further guidance.

Once the undertaking applies for the marker, the Secretariat confirms the receipt of the marker indicating its date and time. Next, the Secretariat sets a deadline for the undertaking to submit the leniency application. In the leniency application, the undertaking must at least disclose its involvement in a sanctionable cartel conduct and explain what the reported agreement 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 antitrust law provision has been infringed.

In addition to submitting a leniency application, an undertaking seeking amnesty must be the first to either:

a provide information or indications, or both, of an unlawful restraint of competition enabling the competition authority to open competition law proceedings (disclosure cooperation); or

b submit evidence enabling the competition authority to find a hardcore cartel, provided that no undertaking has already been granted conditional immunity from a sanction and that the competition authority did not have, at the time the leniency application was filed, sufficient evidence to find an infringement of the CartA (identification cooperation).

Moreover, amnesty can be granted only if the undertaking:

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

b voluntarily submits to the competition authority all available information and evidence relating to the infringement of competition that lies within its sphere of influence;

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

d ceases its participation in the infringement of competition upon submitting its leniency application or upon being ordered to do by the competition authority.

Given COMCO's consent, the Secretariat will inform the undertaking whether it meets the conditions for amnesty, notifies the undertaking if any additional information is needed and, in the event of an anonymous leniency application, sets the time frame within which the undertaking must reveal its identity.

Amnesty can only be granted to a single undertaking; for all other undertakings it is possible to reduce the sanction 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 respective infringement of competition 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 restraints which were not known to the COMCO at the time of such submission (amnesty plus).

Furthermore, according to Article 49a(3) lit. a CartA, no sanctions are imposed if an undertaking notifies the authority of a restraint of competition before it has any effects on the market. However, the sanction is not waived if COMCO opens a preliminary investigation or in-depth investigation within the five months after the undertaking has submitted its notification and the undertaking concerned continues to implement the restraint of competition. The notification procedure according to Article 49a(3) lit. a CartA is of little practical relevance, as it does not adequately provide immediate legal certainty for the notifying undertaking. A revision process of the CartA, which shall, inter alia, improve the functioning of the notification mechanism, is in progress, although at an early stage (see Section VIII).

Finally, the Secretariat may propose a settlement concerning ways to eliminate an unlawful restraint of competition. A settlement is a way to ensure that an antitrust investigation is completed as quickly and easily as possible. The settlement is drawn up 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 which is not negotiable. Before concluding the settlement, the Secretariat informs the undertakings of a range within which the sanction will lie. Settlements are binding and violations are subject to criminal and administrative sanctions (see Section V).

V PENALTIES

Direct sanctions in the form of fines are imposed on undertakings that participated in hardcore horizontal cartels according to Article 5(3) CartA, participated in hardcore vertical restraints in the sense of Article 5(4) CartA (see Section I) or abused their dominant position in the sense of Article 7 CartA. According to Article 49a(1) CartA, the fine may amount to up to 10 per cent of the turnover that the undertaking realised in Switzerland during the preceding three financial years (cumulative) at a maximum.

The amount of the fine depends on the duration and severity of the cartel conduct 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 method of calculation 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 cartel conduct.

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 COMCO shall finally ensure that the fine is proportional in order to prevent a market exit of the undertaking. In any case, the fine is capped at 10 per cent of the cumulative turnover realised in Switzerland during the preceding three financial years.

Furthermore, the CartA provides for fines for other violations in cartel matters. Based on Article 50 CartA, an undertaking that violates an amicable 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. Based on Article 52 CartA, an undertaking that fails to fully provide information or produce documents can finally be charged up to 100,000 Swiss francs.

The CartA does not provide for (direct) criminal sanctions against individuals that engage in cartel activities. However, individuals acting for undertakings may face (indirect) criminal sanctions for other violations in cartel matters. Based on Article 54 CartA, any person who wilfully violates a settlement decision, any other enforceable decision or court judgement in cartel matters, can be fined up to 100,000 Swiss francs. Based on Article 55 CartA, individuals that wilfully fail to fully comply with the obligation to provide information during an investigation can be fined up to 20,000 Swiss francs. Individuals that are subject to fines include members of the board of directors, (de facto) managing directors and any other independent decision-maker in the undertaking such as shareholders controlling the majority stake of the undertaking. Criminal sanctions against individuals are statute-barred after five years following a violation of a settlement decision or any other enforceable decision and two years following other violations in cartel matters.

VI 'DAY ONE' RESPONSE

In a government cartel investigation that was opened with COMCO's approval, the Secretariat may order and conduct unannounced dawn raids and seizures of evidence. The Secretariat's search team has the right to search business premises as well as private residences. When seizing evidence, the search team has the right to inspect documents and electronic files. With respect to electronic files, all data that can be accessed from within the searched premises may be searched.

During a dawn raid, the persons concerned have an obligation 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 as aggravating circumstances when assessing the sanction.

The persons concerned have an obligation, in principle, to disclose information and documents upon specific request. However, there is no obligation to actively participate in the search unless a leniency has been filed. In either case, the persons concerned may invoke the protection of attorney–client privilege to preclude an actual search of documents and data carriers by the search team. The attorney–client privilege applies to documents produced by independent attorneys admitted to the bar and thus permitted to represent parties before Swiss courts. In contrast, work products of in-house counsels are not covered by the attorney–client privilege. Besides the possibility of invoking attorney-client privilege, objections to the search may also be raised by asserting another professional privilege, the private nature of the data, or any other search prohibition to arrange for sealing of documents and other records. The objection must be raised immediately or at the latest at the end of the search.

While the undertaking has a right to be assisted by external counsel, the search team does not have to wait for the attorney's arrival before starting to search premises or seize evidence. However, evidence found during the attorney's absence will be separated and set aside for the attorney to later screen, comment on its contents, and, if necessary, request that it be sealed.

The very first interrogations may take place during the dawn raid (i.e., on the same day). Individuals subject to interrogation have the right to legal assistance. The undertaking's current executive bodies may in principle be represented by the undertaking's attorney. Other individuals who have allegedly committed or witnessed a competition law infringement must be represented by a private attorney if they wish to seek counsel. The Secretariat can compel testimony from witnesses but not from the current executive bodies who, in principle, are entitled to remain silent if the undertaking they represent is subject to sanctions. Any hearings or witness statements must be put on record. The parties subject to interrogation have the right to read the record and comment on their statements on conclusion of the interrogation.

Considering the above, undertakings are advised to prepare for the unlikely event of a dawn raid. It is advisable to appoint an internal dawn raid response team consisting of a team leader (who ideally is 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. Additionally, it is advisable to establish dawn raid guidelines, whereby it is typically 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: (1) the composition of the dawn raid response team and contact details of any external lawyer; (2) description of the steps to be followed during a dawn raid, such as the immediate decision on whether a leniency application shall be filed; (3) 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 (4) a description of the competences of the officers, such as an outline of which type of files may be searched and seized. As a further preparatory element, the 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 parties impeded by an unlawful restraint of competition from entering or competing in a market may request the following in civil proceedings:

a elimination of an unlawful restraint of competition;
b an injunction against an unlawful restraint of competition;
c damages; or
d remittance of illicitly earned profits.

The claim for damages is limited to the damage actually incurred. Swiss law does not recognise punitive damages. However, a claimant may request the remittance of illicitly earned profits. Furthermore, an extraordinarily high profit can be taken into account in the proceedings before COMCO and may lead to a higher sanction, even if this does not lead to damages being awarded.

Civil proceedings are rare in Switzerland. The incurring court and legal costs of such proceedings are generally to be borne by the underlying party. In addition, the claimant bears the burden of proof, but often has no access to the evidence mainly held by the defendant. Also, the claimant must provide full proof of the competition law violation and any damage incurred as a result from this violation. If the admissibility of a restraint of competition is in

question, the civil court shall submit the case to COMCO for an expert opinion. The civil court is not bound but will generally not deviate from COMCO'S expert opinion or any previous decisions in this matter.

VIII CURRENT DEVELOPMENTS

i Ongoing and anticipated amendments and revisions

Partial revision of the CartA initiated

On 12 February 2020, the Federal Council initiated a partial revision of the CartA by instructing the Federal Department of Economic Affairs, Education and Research to prepare a draft for the consultation process. A main focus of the revision concerns the Swiss merger control regime. The aim is to change from the current qualified market dominance test to the internationally well-known significant impediment to effective competition test (the SIEC test). Further aspects of the planned revision concern an introduction of regulatory deadlines for the competition authorities and courts in order to accelerate administrative proceedings. In addition, party compensation shall be introduced for all phases of administrative proceedings in competition law matters, including proceedings before COMCO. Finally, further aims of the initiated revision are to strengthen the civil competition law procedure and to improve the notification procedure (see Section IV). The revision is still in an early stage, and its outcome is thus uncertain.

A motion submitted by Français Olivier of 13 December 2018 (Motion 18.4282) aims at amending Article 5 CartA in order to correct the strict stance taken in the *Gaba* case law (see Section I). The motion demands that instead of a 'per se' illegality of certain types of agreements, both qualitative and quantitative criteria shall always be considered when assessing the legality of agreements or concerted practices. To this end, the motion demands that the notion of agreement or concerted practice that significantly affects competition be revised. While the Federal Council rejected the requested amendment in its opinion, the Swiss Federal Council of States has decided in favour of the motion on 15 December 2020. As a next step, the motion will be discussed in the Swiss Federal National Council.

Fair Price Initiative and indirect counterproposal

The Fair Price Initiative and a counterproposal submitted by the Federal Council are currently being debated in Parliament. The main aim is to combat the comparatively high price levels in Switzerland by introducing means against price discrimination against Swiss companies and customers. A core element of the initiative is the introduction of the concept of relative market power. According to the latest decision in Parliament, the concept of relative market power shall have a broad scope of application, applying to both companies abroad that supply goods or services to Swiss customers as well as to companies domiciled in Switzerland in general. A company is deemed to have 'relative market power' if another company is dependent on it with respect to the supply of or demand for certain products or services due to a lack of alternatives to switch to a different source or business partner. Unlike the concept of market dominance, relative market power does not relate to a general possibility of the dominant undertaking to behave independently of its trading partners, but always relates only to a specific relationship between two undertakings. The counterproposal introduces a right of Swiss companies to purchase goods and services from any company with relative market power at the same prices and conditions abroad.

Parliament has not yet been able to agree on a final counterproposal but agreed on the introduction of the concept of relative market power and effective legal measures against abusive price premiums on 2 December 2020. The matter, including further provisions, such as a proposed ban of geo-blocking in online shopping, will be further debated in parliament in the course of 2021.

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. Quite to the contrary, COMCO issued a statement in March 2020, according to which it pointed out that competition law shall also remain fully applicable during the crisis.

A core focus area of COMCO and court decisions in recent years was on combating restrictions of parallel imports into Switzerland. Leading cases such as the above-mentioned *Gaba* decision in 2016 of the Swiss Federal Supreme Court have had a major impact on Swiss competition law practice (see Section I). Most recently, an investigation was opened in mid-2020 against a tobacco producer with respect to alleged restrictions of parallel and direct imports into Switzerland.

Combating bid rigging and collusion in procurement cases has continued to be an important area of COMCO's activities. In 2020, COMCO investigated a bid rigging agreement in the area optical network. This investigation was the first in the area of procurement in the IT sector. COMCO conducted dawn raids in early 2020 at the companies involved and closed the investigation with sanctions towards the end of the year. Furthermore, COMCO opened a new investigation into possible agreements in the construction sector in the Moesa region in the canton of Grisons. In the past few years, COMCO had already conducted several investigations into bid rigging cartels in the construction area in the canton of Grisons.

In 2020, the Secretariat published a noteworthy advisory opinion on joint purchasing agreements based on the request of four companies that compete in the business of convenience shops and kiosks, food retailing, food wholesaling and fast food catering. The companies planned to procure their goods through a joint purchasing cooperation in order to achieve more favourable purchasing prices. According to the Secretariat's advisory opinion, joint purchasing agreements between competitors shall not be 'per se' unlawful, even though these agreements constitute price-fixing agreements in the sense of Article 5(3) CartA. Although the advisory opinion of the Secretariat does not have a binding effect for COMCO or courts, it is nevertheless significant as it demonstrates that a strict 'per se' illegality of hardcore restrictions as set forth in the *Gaba* decision (see Section I) is not appropriate under certain conditions, such as in the case of joint purchasing agreements. In the case at hand, the question whether the joint purchasing agreement lead to a significant restriction of competition was ultimately left open.

Appendix 1

ABOUT THE AUTHORS

MONIQUE STURNY

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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 particular in-depth knowledge in 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).

Monique Sturny has been selected by *Who's Who Legal* as a Future Leader in competition law in 2018, 2019 and 2020, referring to her as 'highly recommended' by peers and clients alike who highlight her 'strength in vertical agreements and distribution law' and as a National Leader in 2020, pointing out that she is 'highly experienced' with a 'remarkable facility for providing top-tier counsel on Swiss and EU law'. In 2020, the Swiss Competition Commission appointed her as non-governmental adviser to the International Competition Network (ICN) for the coming three years.

Monique Sturny's professional languages are German, English and French. She is registered with the Zurich Bar Registry and is admitted to practise in all of Switzerland.

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Michael Schmassmann is an associate at Walder Wyss. He advises companies on all aspects of competition law matters, assists them in Swiss merger control work and represents them in proceedings before competition authorities and courts. He specialises in IP-related technology transfers and R&D cooperation within regulated industries. He also has experience in the field of internal and regulatory investigations.

Michael Schmassmann was educated at the University of St Gallen (BA HSG in economics, 2014; BA HSG in law and economics, 2015; MA HSG in law, 2017) and the University of Texas (Exchange LLM, 2016).

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ISBN 978-1-83862-763-8