

Update

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Conditional Access to Files in Cartel Proceedings

The Swiss Federal Administrative Court has authorised the Swiss Competition Commission (ComCo) to grant access to certain data of a closed cartel investigation to a municipality seeking civil damage claims.

Background of the Decision

The Swiss Federal Administrative Court (the “Court”) had to decide on the disclosure of information of a cartel investigation regarding a bid rigging cartel in the construction sector. The respective decision of the ComCo was final and binding. Two municipalities affected and potentially damaged by the conduct requested access to the investigation files which was granted by the ComCo. On appeal by three construction companies, the Court held for the first time that the municipalities had a right to access the ComCo files to ensure a careful management of tax payers’ money and to reverse the harmful effects on competition (inter alia by filing civil damage claims against cartel members).

Access to data only

However, the Court limited the access to the ComCo files in various respects: first, data may only be accessed to the extent necessary, meaning that data retention for later use is not allowed. Second, access is to be limited to data that “directly affects” the requesting party. Third, access may only be granted and data may only be

used to serve the purpose disclosed in the access request and a legal obligation must be imposed on the requesting party to that effect. Fourth, access to the ComCo files must not include data of companies that were involved in the investigated conduct but which had not been addressees of the decision.

Access of private entities and the protection of leniency applicants remain open

In the case at hand, the Court did not have to decide on information requests of private undertakings. It would appear that in such a case the conditions applied by the Court are all the more relevant. Neither did the Court formally decide on the issue of access to leniency application data. However, the Court explicitly endorsed the practice of ComCo to exclude leniency information completely from the access of third parties. Whether these third parties are public or private entities should have no bearing.

The decisions are not final and may be appealed before the Swiss Federal Supreme Court.

Please do not hesitate to contact us in case of any questions.

Your contacts

Zurich

Marcel Meinhardt
marcel.meinhardt@lenzstaehelin.com
Tel: +41 58 450 80 00

Astrid Waser
astrid.waser@lenzstaehelin.com
Tel: +41 58 450 80 00

Geneva / Lausanne

Benoît Merkt
benoit.merkt@lenzstaehelin.com
Tel: +41 58 450 70 00

Our offices

Geneva

Lenz & Staehelin
Route de Chêne 30
CH-1211 Genève 6
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

Zurich

Lenz & Staehelin
Bleicherweg 58
CH-8027 Zürich
Tel: +41 58 450 80 00
Fax: +41 58 450 80 01

Lausanne

Lenz & Staehelin
Avenue du Tribunal-Fédéral 34
CH-1005 Lausanne
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

www.lenzstaehelin.com

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