



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Switzerland: Cartels

This country-specific Q&A provides an overview to cartels laws and regulations that may occur in Switzerland.

This Q&A is part of the global guide to Cartels. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/cartels/>



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1. **What is the relevant legislative framework?**

The Federal Law on Cartels and Other Restraints of Competition (the Cartel Act) is the legislation regulating cartels in Switzerland. The regulatory framework is complemented by several federal ordinances. Further, there are general notices and communications of the Competition Commission (the Commission).

2. **To establish an infringement, does there need to have been an effect on the market?**

The Cartel Act is based on the principle of abuse. To be unlawful, an agreement must either eliminate effective competition or significantly restrict effective competition without being justified on economic efficiency grounds.

The following horizontal and vertical restraints (hard-core restraints) are presumed to eliminate effective competition without actual effect on the market: (a) horizontal agreements that directly or indirectly fix prices; restrict quantities of goods or services to be produced, purchased or supplied; or allocate markets geographically or according to trading partners; and (b) vertical agreements that contain minimum or fixed resale prices; or foreclose geographical markets. The presumption is rebuttable. However, hard-core restraints constitute significant restraints of competition by definition (*per se*) and are unlawful if they cannot be justified on economic efficiency grounds.

For all other anti-competitive agreements it needs to be assessed as to whether they significantly affect competition and if yes, whether they can be justified on economic efficiency grounds.

Only hard-core restraints may trigger direct sanctions under the Cartel Act.

3. **Does the law apply to conduct that occurs outside the jurisdiction?**

The Cartel Act applies to all concerted practices and agreements that have a direct, substantial and reasonably foreseeable effect within Switzerland (effects doctrine). The mere possibility of effects is sufficient.

4. **Which authorities can investigate cartels?**

The relevant authorities are the Commission and the Secretariat of the Commission (the Secretariat). The Commission is the deciding body in cartel matters, while investigations are conducted by the Secretariat. The Secretariat prepares the Commission's decisions.

5. **What are the key steps in a cartel investigation?**

In some cases the Secretariat may conduct a *market observation*. This is an informal proceeding. In this phase, the Secretariat has no investigative powers and the undertakings usually have no duty to cooperate.

A formal cartel investigation starts with a *preliminary investigation*. In the preliminary investigation, the Secretariat may allow the undertakings concerned to comment on a complaint, send questionnaires to the undertakings or propose measures to eliminate or prevent restraints of competition. There are no deadlines and the specific steps depend largely on the case and are at the discretion of the Secretariat.

An *in-depth investigation* will be opened directly (e.g. in case of dawn raids) or following the preliminary investigation if there are indications of an unlawful



restraint of competition. The Secretariat publishes the opening of an investigation. The investigation by the Secretariat is concluded with a proposed draft decision by the Secretariat (equals procedurally the Statement of Objections in the EU). The parties involved in the investigation may comment on the Secretariat's proposed draft decision in writing. The duration of the investigation depends largely on the case and can take years.

6. What are the key investigative powers that are available to the relevant authorities?

The Secretariat has broad investigative powers. It may send requests for information to the undertakings concerned as well as to third parties (such as competitors or suppliers), ask for statements and interrogate parties and witnesses. The parties to the investigation are, in principle, required to disclose information and documents. The Commission has the power to order inspections, dawn raids and seizures. In the case of a dawn raid, the Secretariat has the right to search all types of premises, both business premises and private apartments, and all types of devices. In the field of electronic data, the search authorisation extends to all data that can be accessed from within the searched premises irrespectively of the actual place of storage. The Secretariat conducts interrogations of directors/employees already during the dawn raid.

The undertakings concerned have an obligation to endure the dawn raid passively and not interfere with any investigation activity. Undertakings subject to an inspection have the right to be assisted by external lawyers.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by

the relevant authorities?

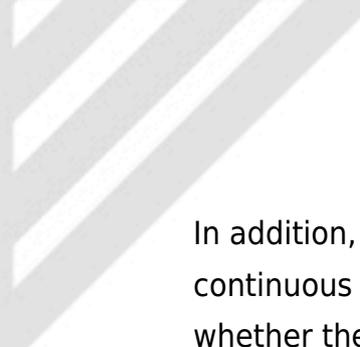
The legal privilege applies only with regard to lawyers who are entitled to represent the person before Swiss courts in accordance with the Law on Lawyers. This excludes in-house counsels, who cannot invoke the legal privilege and professional confidentiality. Objects and documents containing legally privileged information may not be confiscated and do not require production, provided the lawyer himself is not accused of the same conduct. It is irrelevant, where the documents are situated (in the possession of the undertaking or the lawyer).

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

An undertaking that cooperates with the Commission in view of the discovery and the elimination of a restraint of competition may benefit from total or partial immunity. There are no statutory deadlines for applying for immunity or leniency. However, only the first applicant may enjoy total immunity. Immunity and leniency applications may be submitted orally (paperless proceeding).

Anonymous leniency applications are allowed, although the leniency applicant will be required to reveal its identity within a specific time frame established by the Secretariat on an *ad hoc* basis.

Total immunity requires the undertakings to (i) provide new information enabling the Commission to open an in-depth investigation (disclosure cooperation); or (ii) submit new evidence enabling the Commission to find a hard-core horizontal or vertical agreement, provided that no undertaking has already been granted conditional immunity (identification cooperation).



In addition, the undertaking has to fulfil further conditions (no instigating role, continuous cooperation, abandoning of the infringement). It is disputed as to whether the leniency applicant must admit its involvement in an unlawful agreement and admit effects on the market.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

In order to get partial immunity the company has to notify its participation in a restriction of competition and to cooperate unsolicited in the proceedings.

The sanction may be reduced by up to 50% depending on the importance of the undertaking's contribution to the success of the proceedings.

10. Are markers available and, if so, in what circumstances?

Markers are available and may be applied for, preferably by email. It is also possible to place the marker in person to send it by mail or to make an oral statement (paperless proceeding) on record at its premises of the Secretariat. There are no statutory deadlines for applying or perfecting a marker.

Anonymous markers are possible although the leniency applicant will be required to reveal its identity within a specific time frame established by the Secretariat on an ad hoc basis.

11. What is required of immunity/leniency applicants in terms of

ongoing cooperation with the relevant authorities?

All leniency applicants are under an obligation to continuously cooperate with the competition authority throughout the whole procedure without restrictions and without delay. In practice, undertakings must answer questionnaires and provide newly discovered evidence to the authorities immediately. If an undertaking disputes its involvement in an unlawful agreement for which it filed a leniency application, the Commission may consider this a breach of the cooperation requirement.

Even though, there is no express obligation to keep the identity of the leniency applicant confidential, in practice, the Secretariat does so until the draft decision is issued.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

The competition authorities may not impose direct criminal sanctions on individuals (see Section 6.1).

13. Is there an 'amnesty plus' programme?

Yes. The reduction can amount to up to 80 % if an undertaking provides unsolicited information or presents evidence of further infringements of competition law ("Bonus Plus"). This information or evidence must be such that it meets the usual conditions (see 3.1 above).

14. **Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?**

The Secretariat may propose settlements to the undertakings involved concerning ways to eliminate the restraint of competition. A settlement requires formal approval of the Commission (no court approval required). The settlement may include a proposal of the range of the fine as only the Commission can decide on the fine. Settlements are binding on the parties and the Commission, and may give rise to administrative and criminal sanctions in the case of a breach of any of its provisions by the parties.

The procedure for a settlement starts with the Secretariat or the parties expressing their interest in a settlement. Typically, this is the moment when parties submit commitments. The Secretariat then sends the standardised framework conditions to the parties who have to agree thereto. The Secretariat also provides for a draft settlement, which is the basis for the "negotiations". In its current practice, the Secretariat insists on a quasi-waiver with regard to an appeal of the settlement decision. The Secretariat agreed settlement is part of the draft decision. If the Commission (or its Chamber) approves the settlement, it becomes binding and will be published.

Hybrid proceedings are in principle possible. In the case of sequential hybrid proceedings (i.e. first a settlement decision and a decision in ordinary proceedings later) the Commission established an independent Chamber for partial decision which will approve the settlement.

15. **What are the key pros and cons for a party that is considering entering into settlement?**

Possible advantages: (i) A reduction of the fine of 5-20% (depending on how

early in the process the settlement occurs), (ii) shorter proceedings, (iv) lower costs and (iii) shorter decisions leading to lower exposure with regard to any follow-on damage claims.

Possible disadvantages: (i) The amount of the fine cannot be negotiated; (ii) the parties waive de facto their right of appeal; (iii) implicit acknowledgement of guilt.

16. **What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?**

The competition authorities are bound by the rules on official secrecy and may use information obtained in the performance of their duties only for the purpose for which it was obtained or for the purpose of the investigation. Any information exchange needs a legal basis and must be assessed in the individual case. The Cartel Act contains a provision only with regard to the Price Supervisor, who can be provided with any information required for the accomplishment of its duties by the competition authorities.

With regard to foreign competition authorities the Cartel Act states that data may only be disclosed to a foreign competition authority based on an act, an international agreement or with the consent of the undertaking concerned. The competition authorities shall notify the undertaking concerned and invite it to state its views before transmitting the data to the foreign competition authority.

Switzerland has entered into an agreement with the European Union concerning cooperation on the application of their competition laws (the EU Cooperation Agreement), which contains further details. Special rules regarding the delivery of sovereign acts such as sanction decisions or the prohibition of a certain behaviour are regulated in a separate exchange of notes between Switzerland and the EU.



In addition, the Cartel Act contains a specific provision with regard to investigations in proceedings under the Swiss/EC Air Transport Agreement. The EU and the Commission provide each other with all necessary information and assistance in the case of investigations, which the other authority carries out under its respective competences as provided in the Air Transport Agreement.

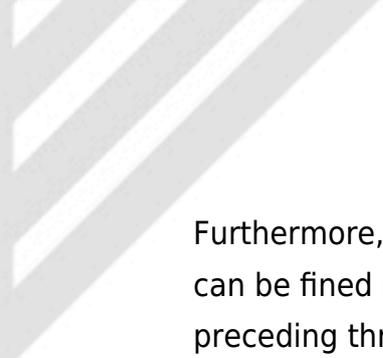
The Agreement on Free Trade and Economic Partnership between the Swiss Confederation and Japan provides for full cooperation with regard to competition issues. Upon request, the national authorities may transmit information which is in their possession and which is relevant for the execution measures of the competition authority of the other state. However, the passing on of confidential information is excluded from the cooperation.

Settlements or leniency applications in other jurisdictions have no legal influence in Switzerland since the Secretariat conducts an independent investigation and legal assessment. The EU Cooperation Agreement excludes any exchange of information under the leniency or settlement procedures, unless the undertaking, which provided the information, has given its express consent in writing.

17. What are the potential civil and criminal sanctions if cartel activity is established?

Agreements infringing the Cartel Act, irrespectively of whether they may trigger direct sanctions are totally or partially null and void as of the moment they were entered into (*ex tunc*).

Direct sanctions (fines) are imposed on undertakings that participate in a hard-core restraints (see Section 1.2). The maximum administrative sanction is a fine of up to 10 per cent of the turnover realised in Switzerland during the preceding three financial years (cumulative).



Furthermore, an undertaking that violates an amicable settlement or a decision can be fined up to 10 per cent of the turnover it achieved in Switzerland in the preceding three financial years. Finally, an undertaking that fails to provide information or produce documents, or that only partially complies with its obligations during an investigation, can be fined up to 100,000 Swiss francs.

There are no direct criminal sanctions for individuals for cartel activities in the Cartel Act. However, individuals acting for an undertaking, who violate a settlement decision, any other enforceable decision or court judgment in cartel matters, may be fined up to 100,000 Swiss francs. In addition, individuals who intentionally fail to comply or only partly comply with the obligation to provide information during an investigation can be fined up to 20,000 Swiss francs.

The Swiss Public Procurement Act provides that the contracting authority may exclude undertakings from an ongoing procurement procedure or delete them from a list of qualified undertakings in cases of cartel conduct. In addition, several cantonal procurement acts provide that undertakings may be banned from participating in procurement procedures for a period of several years in cases of cartel conduct. Individuals involved in cartel conduct in public procurement proceedings may be subject to direct criminal sanctions under the Swiss Criminal Code, particularly for fraud, bribery and forgery of documents (see also Section 3.5)

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

The amount of the fine is calculated by taking into account the duration and gravity of the unlawful agreements or practices, as well as the presumed profit arising from the unlawful agreements or practices.

The highest sanction the Commission ever imposed was around 157 million Swiss francs against BMW restricting parallel imports to Switzerland.

19. **Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?**

If the company is controlled by another entity, the unlawful practice is attributed to the controlling entity, which is jointly and severally liable with its subsidiary, if it is actually able to control the subsidiary and de facto exercises such control.

20. **Are private actions and/or class actions available for infringement of the cartel rules?**

Third parties impeded may request the elimination of the unlawful agreement, injunctions, damages or restitution of unlawful profits before the civil courts.

However, contrary to the proceedings before the Commission the burden of proof in civil proceedings is with the claimant. Under Swiss law, the main hurdles are providing concrete proof of the damage incurred, as the passing-on defence is possible, and establishing a sufficient nexus between the anticompetitive agreement and the damage. Court costs and legal costs (calculated relative to the amount of the claim) must usually be borne by the losing party and a limitation period of one year as of knowledge of the damage and the infringing party applies. As a consequence, civil proceedings are very rare in Switzerland.

Class actions are not possible in Switzerland. Currently, group settlement procedure and an expansion of group actions is discussed in Swiss parliament.

21. **What type of damages can be recovered by claimants and how are they quantified?**

The claim is limited to the damage actually incurred; no punitive damages are available in Switzerland. Passing-on defences are not excluded. However, a claimant may request the remittance of illicitly earned profits.

22. **On what grounds can a decision of the relevant authority be appealed?**

Final decisions of the Commission can be appealed before the Federal Administrative Court, which has full cognition regarding the facts and legal assessment. An appeal against interim orders such as decisions regarding the status of third parties or access to the files is subject to more restrictive conditions.

The final decisions of the Federal Administrative Court can be appealed before the Federal Supreme Court. An appeal regarding interim orders is subject to more restrictive conditions. Before the Federal Supreme Court, the appellant may only contend a violation of federal, cantonal or international law. The establishment of the facts may be challenged only if it is manifestly incorrect or based on an infringement of law and if it may be decisive for the outcome of the proceedings. New facts and evidence may only be presented to the extent that the decision of the lower court gives rise to them. New motions are inadmissible.

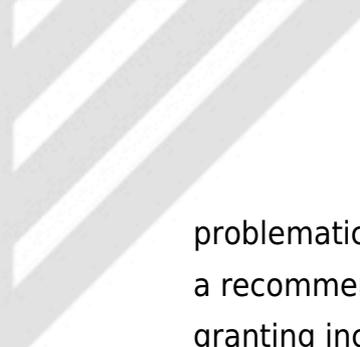
23. **What is the process for filing an appeal?**

The fully reasoned appeal against the decision of the Commission must be filed within 30 days of notification of the ruling with the Federal Administrative Court. The appeal has suspensive effect (i.e. any sanction in particular does not have to be paid until the decision of the appeals court). The proceeding before the Federal Administrative Court is a written one albeit the court may conduct hearings. The Federal Administrative Courts issues a new decision in the case or in exceptional cases refers the case back to the Commission and issues binding instructions.

The appeal against the decision of the Federal Administrative Court must be filed within 30 days of the notification with the Federal Supreme Court. The appeal before the Federal Supreme Court has no suspensive effect by law but can be requested by the appellant. The court proceeding is a written one.

24. **What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?**

In January 2018, the Federal Administrative Court reversed the sanctions against Pfizer, Eli Lilly and Bayer imposed by the Commission. Pfizer, Eli Lilly and Bayer sell their medications for erectile dysfunction in Switzerland through pharmacies and self-dispensing physicians who are authorised to sell medications. All three pharmaceutical companies had published retail price recommendations (RPR) for these medications, which were explicitly designated as 'non-binding'. In November 2009, the Commission ruled that publishing and following the RPR under the specific circumstances of the case would result in an unlawful and sanctionable vertical price-fixing. Pfizer, Bayer and Eli Lilly were prohibited from further publishing the RPR. In addition, the three pharmaceutical companies were fined a total of 5.7 million Swiss francs. With its three decisions of 19 December 2017, the Federal Administrative Court set aside the sanctions against Pfizer, Eli Lilly and Bayer imposed by the Commission. It held that unilaterally announced, recommended prices are only



problematic from a competition law point of view if they lose their character as a recommendation and are monitored and enforced by exerting pressure or granting incentives. The Federal Administrative Court's decisions have not entered into legal force yet.

25. **What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, etc.)?**

In November 2018, the Commission has opened an investigation against several financial institutions with regard to an alleged boycott of mobile payment solutions such as Apple Pay or Samsung Pay. It seems likely that the financial sector will continue to be the subject of investigations.

Further, the fight against market foreclosure (i.e. territorial protection or vertical price fixing) continues to be a priority for the Commission. Settlements play an important role, especially with regard to "hard-core restrictions" (see Section 1.2).

26. **What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?**

The "Fair-Price-Initiative" envisages the introduction of the concept of relative market power. It calls for measures against disproportionately high prices and the skimming of purchasing power by domestic and foreign companies operating across borders. The introduction of a ban on private geoblocking measures is also being considered. The Federal Council has decided to present an indirect counterproposal to the Initiative, which provides that relatively dominant domestic and foreign companies may, under certain circumstances,



be obliged to supply companies from Switzerland via delivery channels abroad. This is intended to create opportunities for parallel imports and thus strengthen competition. Ultimately, the Swiss people then have the opportunity to vote on the Initiative.