

Unclassified

DAF/COMP/GF/WD(2016)48

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

10-Nov-2016

English - Or. French

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

## **Global Forum on Competition**

### **SANCTIONS IN ANTITRUST CASES**

#### **Contribution by Switzerland**

-- Session IV --

**1-2 December 2016**

*This contribution is submitted by Switzerland under Session IV of the Global Forum on Competition to be held on 1-2 December 2016.*

Ms Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division,  
Tel: +33 1 45 24 18 77, Email: Lynn.Robertson@oecd.org.

**JT03405174**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

DAF/COMP/GF/WD(2016)48  
Unclassified

English - Or. French

## SANCTIONS IN ANTITRUST CASES

### -- Switzerland --

#### 1. Introduction

1. In Switzerland, the regime of administrative sanctions for violations of the Federal Act on Cartels (CartA)<sup>1</sup> was introduced during the partial revision of said Act which entered into force in 2004. The introduction of administrative sanctions also included a leniency programme and detailed provisions for searches.

2. Since 2006, the Swiss Competition Commission (COMCO) has sanctioned around thirty cases of illegal restraint, resulting in total fines of around CHF 950 million<sup>2</sup> being imposed on over 130 undertakings.<sup>3</sup> Around fifteen appeals against said sanctions are still pending before the appeal courts (Swiss Federal Administrative Court and Swiss Federal Supreme Court). Consequently, and in many cases, the sanctions and the way they have been calculated are not yet definitive. After a presentation of the method used to calculate the basic fine (II), and ways in which the basic fine can be reduced (III), the practical aspects of calculation will be addressed (IV). To conclude, this contribution will examine the reforms to the system of sanctions being debated in Switzerland (V).

#### 2. Calculation of the basic fine

3. Sanctions under Swiss competition law are administrative sanctions (CartA, Art. 49a, para. 1) imposed on businesses i.e. almost always legal persons. Criminal sanctions against natural persons do exist in the event of the wilful breach of an amicable settlement or a final ruling of the competition authorities (CartA, Art. 54). This provision has never been used.

4. The rules for calculating fines for antitrust infringements are set out in the Cartel Act Sanctions Ordinance (CASO).<sup>4</sup> This ordinance also details the functioning of the leniency programme introduced at the same time as the direct sanctions in 2004. The Swiss legislator considered that guidelines, such as those which exist in many countries, were not sufficient to provide legal certainty.

---

<sup>1</sup> Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (Cartel Act, CartA), RS 251, with versions available in French: <https://www.admin.ch/opc/fr/classified-compilation/19950278/index.html>, and English: <https://www.admin.ch/opc/en/classified-compilation/19950278/index.html>.

<sup>2</sup> Approximately the same amount in Euros.

<sup>3</sup> COMCO's rulings are published in the Law and Policy on Competition (LPC) review in the language of the original procedure, which are available at [www.comco.ch](http://www.comco.ch) in the Documentation/Legislation section.

<sup>4</sup> Ordinance of 12 March 2004 on Sanctions imposed for Unlawful Restraints of Competition, RS 251.5, with versions available in French: <https://www.admin.ch/opc/fr/classified-compilation/20040326/index.html>, and in English: <https://www.admin.ch/opc/en/classified-compilation/20040326/index.html>.

5. This ordinance largely replicates the 1998 EU guidelines on the method of setting fines<sup>5</sup>, which was a forerunner in that, prior to the 2006 revision of EU guidelines,<sup>6</sup> it sought to strengthen the dissuasive impact of sanctions, mainly by increasing the basic fine. In the 2000s, there had already been calls for an increase in financial penalties.

## 2.1 *The basic amount*

6. According to CartA, Article 49a, para. 1, the amount of the sanction is dependent on the duration and severity of the unlawful behaviour. Due account is also taken of the likely profit that resulted from the unlawful behaviour.

7. The starting point for calculating the sanction is the basic amount (CASO, Art. 3), which amounts to a maximum of 10 per cent of the turnover achieved in the relevant markets in Switzerland during the preceding three financial years. In practice, COMCO uses the three financial years preceding the end of the illegal restraint, as the purpose of the basic amount is to confiscate the unlawful income derived from the infringement.<sup>7</sup> This is a Swiss variant designed to avoid any attempts to manipulate turnover or to record zero or reduced turnover. In practice, the multiple of the basic amount varies between 5% (for vertical agreements) and 7% or 10% for hardcore horizontal agreements. In one case of horizontal agreements on price components, the multiple of the basic amount had been set at a much lower level following a preliminary initial inquiry which did not result in the opening of a formal investigation.<sup>8</sup> For abuse of dominance, a broader range can be used for the multiple of the basic amount.

8. The basic amount depends on the definition of the relevant market. Under CASO, the definition of the relevant market is generally the same as that used in competitive analysis.<sup>9</sup> Accordingly, turnover does not necessarily comprise turnover achieved solely from the infringement.<sup>10</sup> Similarly, in the ADSL II case, the Swiss Federal Administrative Court found that the authority, when setting the basic amount, should take into consideration not only turnover achieved in the markets in which the undertaking committed its abuse of dominance, but also turnover achieved in markets affected by the infringement.

## 2.2 *Duration*

9. The ordinance sets out increases to the basic amount according to the duration of the infringement of competition. There is no increase if it lasted just one year; if it lasted for two to five years, the basic amount can be increased by up to 50 per cent (CASO, Art. 4). As a general rule, COMCO also applies an increase of 10% per year after the first year.

---

<sup>5</sup> Guidelines on the method of setting fines imposed pursuant to EEA rules on competition [Official Journal C 9 of 14 January 1998, p. 3.]. Cf. the explanatory notes relating to CASO, available at [www.comco.ch](http://www.comco.ch) in the Documentation/Legislation section.

<sup>6</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [Official Journal C 210 of 1 September 2006].

<sup>7</sup> Practice confirmed by the Swiss Federal Administrative Court: RPW 2015/3, 691 N 769, ADSL II.

<sup>8</sup> Ruling of 29 June 2015, Badezimmer (not yet published). See press release of 3 July 2015.

<sup>9</sup> Practice confirmed by the Swiss Federal Administrative Court: RPW 2015/3, 686 N 723, ADSL II.

<sup>10</sup> RPW 2015/3, 686 N 722, ADSL II.

### 2.3 *Aggravating and mitigating circumstances*

10. Articles 5 and 6 of the ordinance contain examples of mitigating circumstances (e.g. a strictly passive role in the restraint of competition) and aggravating circumstances (e.g. repeated infringements of the Cartel Act, an instigating role in the infringement).

11. With a view to ensuring the preventive impact of the sanctions, it is also provided that a profit achieved due to the infringement that is particularly high by objective standards is considered to be an aggravating circumstance (CASO Art. 5 para. 1.b.). A “normal” profit, which is considered to be a profit in excess of the basic amount, is already factored into said amount. The explanatory notes to the ordinance even indicate that the sanction should be increased to at least the level of the profit achieved.<sup>11</sup> The rationale behind this is to ensure the preventive impact of the sanctions without a constant requirement to determine the profit achieved in order to calculate the sanction. This provision has been used several times in cases of abuse of dominance.<sup>12</sup> In the ADSL II case, Swiss Federal Administrative Court did not grant an increase in the sanction on these grounds as COMCO failed to provide an objective estimate of the illegal profits achieved.<sup>13</sup>

### 2.4 *Principle of proportionality*

12. Article 49a, para. 1 of the Cartel Act, and Article 7 of CASO provide that the sanction shall not exceed 10% of the turnover achieved in Switzerland during the preceding three financial years. The aim here is to assess the financial capacity of the undertaking. Accordingly, COMCO takes into consideration the three financial years preceding the ruling for the group as a whole.<sup>14</sup>

13. Moreover, the principle of proportionality is specifically mentioned in CASO Article 2, para. 2., reflecting the legislator’s concern that the financial penalties might cause the collapse of the undertakings in question.<sup>15</sup> The principle of proportionality may apply in the event of inability to pay the fine (see below), but also if the sanction imposed under CASO is close to the maximum sanction under Article 49a, para. 1 of the Cartel Act. In one case of a vertical agreement, the sanction was close to the legal limit and represented a substantial proportion of the value of the undertaking under the sales agreement. The sanction was reduced significantly on the grounds of the principle of proportionality.<sup>16</sup>

---

<sup>11</sup> Explanatory notes to CASO, Art. 5, para. 1.b..

<sup>12</sup> RPW 2007/2, 241 et seq., Swisscom Terminierung Mobilfunk.

The ruling was overturned by the Swiss Federal Supreme Court. COMCO had increased the basic amount by 50% based on the profit achieved.

<sup>13</sup> RPW 2015/3, 691 N 768-774, ADSL II.

<sup>14</sup> See Ruling of 20 August 2012, N 326, Altimum SA.

<sup>15</sup> See Explanatory notes to CASO, Art. 2.

<sup>16</sup> See Ruling of 20 August 2012, N 343 et seq., Altimum SA.

### 3. Adjusting the fine

#### 3.1 *The most regularly cited circumstances*

14. The most common mitigating circumstance accepted by COMCO is the approval of an amicable settlement under Article 29 of the Cartel Act. An amicable settlement is seen as a form of additional co-operation with the authority, over and above the legal commitments of the undertaking. Under an amicable settlement, the undertaking commits to changing its future conduct. The approval of an amicable settlement with the authority results in a reduction of the fine by up to 25%<sup>17</sup> depending on the timing of the settlement in the procedure and the extent of co-operation.<sup>18</sup> The earlier the amicable settlement in the procedure, with all the parties involved, the greater the reduction of the fine.

15. The parties often use a passive role in the infringement as a mitigating circumstance. To date, this argument has been accepted in just one case, when small undertakings were forced to participate in unlawful agreements because their catalogue was subsidised by the other members of the cartel.<sup>19</sup>

16. In terms of aggravating circumstances, COMCO has taken into consideration, in the case of submission agreements sanctioned submission by submission for example, the fact that the undertaking repeatedly infringed the Cartel Act by using cover bids (markets with no turnover achieved). In instances such as these, COMCO has increased the sanctions (increase in the duration of the basic amount) as a result of aggravating circumstances by up to 200% depending on the number of illegal cover bids or bid-suppressions.<sup>20</sup>

#### 3.2 *Compliance programme*

17. The existence of a compliance programme within the undertaking can constitute a mitigating circumstance. It is difficult, however, to define precisely which criteria a compliance programme should meet in order to qualify as such. Much depends on the size of the undertaking and the sector of the economy in which it operates (see also part V).

18. In practice, the parties often use this mitigation if the infringement was committed by an employee who does not have the status of company executive. To date, it has never been accepted by COMCO. In general, COMCO asks what concrete measures have been put in place by the undertaking to ensure respect for the law and what internal checks and disciplinary systems are in place to guard against violations of cartel law.<sup>21</sup> In the ADSL II case, the Swiss Federal Administrative Court left open the question of whether the compliance programme at the company Swisscom justified a more lenient

---

<sup>17</sup> For an insight into the practice of reducing the fine in return for an amicable settlement, see: RPW 2013/2, 202 N 314 et seq., Abrede im Speditionsbereich. In rulings to date, reductions of fines following an amicable settlement have ranged from 3% to 25%.

<sup>18</sup> For more details on Switzerland's contribution to the OECD roundtable on Commitment Decisions in Antitrust cases, see: <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282016%2936&doclanguage=en>.

<sup>19</sup> Ruling of 29 June 2015, Badezimmer (not yet published). See press release of 3 July 2015.

<sup>20</sup> RPW 2012/2, 409 N 1108 et seq., Wettbewerbsabreden im Strassen- und Tiefbau in Kanton Aargau, RPW 2013/4, 625 N 975 et seq., Wettbewerbsabreden im Strassen- und Tiefbau in Kanton Zürich.

<sup>21</sup> For example: RPW 2012/2, 414 N 1143, Wettbewerbsabreden im Strassen- und Tiefbau in Kanton Aargau, RPW 2013/4, 629 N 991, Wettbewerbsabreden im Strassen- und Tiefbau in Kanton Zürich.

sanction, because the margin squeeze being practised was known to the compliance programme and had not been called into question.<sup>22</sup>

### 3.3 *Inability to pay*

19. Inability to pay is a claim that is increasingly advanced in relation to proportionality, especially by SMEs. If the undertaking provides documentary evidence of its financial position and the COMCO analysis concludes that it cannot pay the fine without threatening its future as a going concern, the amount the undertaking is being asked to pay will be reduced.<sup>23</sup> The details of the method are not published in the decisions because of the need to protect a great number of business secrets. It is merely stated that COMCO takes account of whether the undertaking is part of a group and the level of its debt. As to payment of the fine, undertakings that are experiencing financial difficulties can offer to pay in instalments.<sup>24</sup>

## 4. Calculating the fines, in practice

20. By law, appeals launched against COMCO fines suspend the administrative procedure (AP).<sup>25</sup> As mentioned in the introduction, a large number of appeals against COMCO rulings remain pending.

21. Until now, the appeals courts have either annulled the sanctions handed down because they considered that the criteria for illegality had not been met<sup>26</sup>, or they maintained the sanctions in their original form.<sup>27</sup> Only on one occasion has a sanction been amended—in the ADSL II case. The Swiss Federal Administrative Court largely upheld the sanction, but reduced it by around 15%. The Court took a different view of the undertaking's responsibility, considering that the latter had acted not deliberately, but negligently. Accordingly, it reduced the multiple for the basic amount from 10% to 8%, resulting in a reduction of the fine from around CHF 220 million to around CHF 186 million.<sup>28</sup>

22. As to the question of whether the level of fines in Switzerland is sufficient to act as a deterrent, it may be somewhat premature since the calculation of sanctions is not well established. Deterrence is not a function of the amount of the fine alone, but also depends on the probability the violation will be detected. Searches are a key weapon in the fight against these infringements: after ten years of operations, in 2016 COMCO reported that they had been instrumental in 24 investigations and had proved their worth.<sup>29</sup>

---

<sup>22</sup> RPW 2015/3, 693 N 780, ADSL II.

<sup>23</sup> Ruling of 27 May 2013, N 752 ss, *Marché du livre écrit en français*; Ruling of 29 June 2015, N 233 ss, *Saiteninstrumente*; Ruling of 14 December 2015, N 326 ss, *Flügel und Klaviere*. Rulings that have yet to appear in the RPW are available online at [www.comco.ch](http://www.comco.ch), Latest news, Latest decisions.

<sup>24</sup> See ruling of 27 May 2013, N. 764, *market for French-language books*.

<sup>25</sup> Federal Act on Administrative Procedure, RS 172.021, available in English: <https://www.admin.ch/opc/en/classified-compilation/19680294/index.html> and in French: <https://www.admin.ch/opc/fr/classified-compilation/19680294/index.html>.

<sup>26</sup> For example: the order of the Swiss Federal Supreme Court of 11 April 2011 in the *Mobile Terminierung Mobilfunk* case, RPW 2011/3, p. 440.

<sup>27</sup> For example: the order of the Swiss Federal Supreme Court of 28 June 2016 in the *Gaba/Elmex* case (detailed ruling not yet available).

<sup>28</sup> This is currently approximately worth the same amount in euros.

<sup>29</sup> Annual Report, RPW 2016/1, p. 70 et seq. (English version), p. 30 et seq. (French version).

## 5. Reform of the penalty system being debated in Switzerland

23. A suggestion was made to reform the penalty system as part of the CartA review launched in 2010.<sup>30</sup> The introduction of sanctions for natural persons responsible for violations was recommended in 2009, in addition to the administrative penalties, in the progress report based on CartA Article 59a.<sup>31</sup>

24. The suggested reform of the penalty system originated in a parliamentary intervention adopted in 2008.<sup>32</sup> There were two parts to the motion:

- Mitigation of the penalty based on the efforts made to ensure CartA compliance (programmes on adherence to cartel law); and
- The introduction into CartA of criminal sanctions for natural persons. The executives and employees who are party to a cartel would have been liable to criminal prosecution for a first offence and not, as is currently the case, subject to a simple fine in the event that they reoffend.

25. In order to implement the first requirement, the Federal Council proposed an amendment to CartA, Article 49a in order to expressly stipulate compliance programmes as the determining factor in the sanction. As for the second, the Federal Council offered two options for public consultation: the introduction of administrative measures<sup>33</sup> or criminal measures<sup>34</sup> (the latter to be based on the exact text of the motion).

26. Following the outcome of the public consultation, the Federal Council's reform bill implemented the first part of the motion, but abandoned the idea of introducing sanctions for natural persons after the latter point was decisively rejected by those taking part in the consultation.

27. The introduction of sanctions for natural persons may certainly have advantages, such as the preventive impact produced by the deterrent effect of criminal sanctions, and treatment that is consistent with other white-collar crimes. But there are also a number of disadvantages:

- It runs the risk of hampering legal action taken against undertakings under cartel law, the mechanism imposing direct penalties on undertakings, introduced in 2004, and new investigatory instruments (leniency programme).
- Penalising employees themselves may displace responsibility. The impact on the behaviour of undertakings must remain the central focus of cartel law, since it is the undertakings themselves that profit from the cartel, and not the employees.

---

<sup>30</sup> Detailed information about the review: <https://www.seco.admin.ch/seco/fr/home/wirtschaftslage---wirtschaftspolitik/wirtschaftspolitik/Wettbewerbspolitik/kartellgesetz/revision-kartellgesetz.html> and <https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20120028>

<sup>31</sup> <https://www.weko.admin.ch/weko/en/home/documentation/evaluation-and-revision-of-the-cartel-act/evaluation-of-the-cartel-act.html>

<sup>32</sup> Motion Schweiger 07.3856 “Droit des cartels. Équilibrer le dispositif des sanctions et le rendre plus efficace” (<https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20073856>)

<sup>33</sup> Partial or total ban on practising a professional activity for a limited period in undertakings that took part in the cartel, and confiscation of that part of the remuneration that was generated by the cartel.

<sup>34</sup> Introduction of fines or prison sentences of up to three years and set-up of two independent procedures: the investigation by the competition authorities into the actions of the undertaking alone, and the investigation of the employees responsible carried out by the penal authorities.

- Action against undertakings will be made more difficult and complex if action is taken simultaneously against employees, since the latter will be less inclined to provide information and the task of co-ordinating the two cases will be challenging.
- Deterrence is not increased. Pursuing prosecutions against natural persons for white-collar crime is complex, time-consuming and expensive, and often results, for lack of evidence, in acquittals or the expiry of the limitation period.
- The authorities would need more staff to identify responsible parties within undertakings.
- The leniency programme would have to be extended to the employees concerned, which would constitute a break from Swiss legal practice.

28. It is also important to remember that employees may already be penalised under the current CartA if the undertakings contravene a ruling or an amicable settlement (CartA, Article 54). The undertakings are also able to take effective measures against senior management acting against competition rules and ignoring compliance programmes.<sup>35</sup>

29. Ultimately, the priorities for cartel law must remain deterrence and penalising undertakings, while sanctions against natural persons may, if considered appropriate, constitute a further penalty on top of those incurred by the undertaking. Since the CartA review was rejected by Parliament in 2014, the system of sanctions has been left untouched.

---

<sup>35</sup> For example, civil law measures such as dismissal, damages, or repayment of bonuses and criminal measures such as prosecution for corporate fraud.