

**Question A: Should a competition authority enjoy an unfettered discretionary power in the context of the investigation of competition law infringements, or should its margin of discretion be subject to certain limits?**

*Preliminary Remark – The scope of this questionnaire is limited to infringements of Articles 81-82 EC and equivalent national law provisions. It thus does not cover (i) State Aid rules; (ii) infringements of procedural rules; (iii) infringements of merger control rules; and (iv) other competition-law related infringements.*

**1. General Questions**

1.1 Please state your name and the country to which your report refers.

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1.2 How many competition authorities in your country are entrusted with the task of *investigating* infringements of competition law?

There is basically only one authority.

Please indicate the names of these authorities and describe their functions and the types of competition law infringements they can investigate.

Name: Swiss Competition Commission (Comco), Berne.

Functions: Comco can investigate any type of competition law infringement which is covered by this questionnaire, and might take the appropriate decisions (art. 18 III Cartel Act).

Please describe the institutional structure of these authorities and provide figures regarding their human and financial resources.

Comco has two bodies (total budget): CHF 7.8 millions.

a) Comco's Secretariat examines the suspected cartels and prepares the decisions (investigating body) (art. 23 I Cartel Act). The Secretariat employs 64 employees (full-time and part-time). This corresponds to a total of 57.9 full-time positions.

b) Comco itself takes the decisions (art. 18 III Cartel Act). Comco has 12 members (art. 18 II Cartel Act). All of them are employed part-time.

1.3 Please indicate whether the investigating authorities (i) are also competent to take decisions finding, terminating and sanctioning infringements;

Yes (see answer 1.2). According to art. 30 Cartel Act, Comco shall take - on a proposal from the Secretariat - its decisions.

(ii) must refer the results of their investigation to a different administrative entity which, in

turn, holds the duty to decide the case, and sanction infringements

No.

or (iii) shall act otherwise (e.g. bring proceedings before a court).

No.

- 1.4 Do competition authorities start investigations at the request of a complainant, *ex officio* or both?

Both. Following art. 26 Cartel Act, the Secretariat may conduct preliminary investigations on its own initiative, at the request of enterprises concerned or on information received from third parties.

Could you estimate the respective shares of investigations upon request and of *ex officio* investigations?

The large majority of investigations seem to be enacted upon request (more than 80%). There is, however, no public data available.

- 1.5. If your country operates a leniency programme for hardcore cartel infringements: has the backlog of pending cartels cases increased since the introduction of the leniency programme?

No public information available. However, the prosecution of hardcore cartels has become more important to Comco.

To what extent has the leniency programme reduced the number of *ex officio* investigations started by the competition authority?

No reliable data available. There is a general feeling that the number of *ex officio* investigations has considerably diminished (by more than 60%).

- 1.6 Can you list the various methods of referral to the authority of your country and, where applicable, provide details of the most common referral methods (third party complaints, applications for immunity by parties to an agreement, notification of a cooperation agreement by the parties, bounties for corporate individuals, referral by an executive body (Minister, etc..), referral by another authority (authority of a third country - ECN or other - or sectoral regulator))?

1) Comco investigates and prosecutes less than 30% of the cases on its **own initiative**.

2) **Third-party complaints** account for more than 70% of abuse of dominance investigations.

3) **Applications for immunity** are getting more and more frequent (more than 50% of Cartel cases).

5) 5% of the cases are **referred by non-competition authorities**: a) Agencies dealing with public procurement refer to Comco in order to open investigation; b) Other sector regulators are requiring Comco's legal opinion.

5) 5% of the cases are referred to Comco for an **opinion** if the lawfulness of a restraint of competition is questioned in the course of a civil proceeding (art. 15 Cartel Act).

## 2. The Preliminary Investigation – Procedural Issues

- 2.1 Does the competition authority systematically carry out a preliminary investigation before the opening of a formal investigation?

The Secretariat will generally conduct preliminary investigations to establish whether there is an initial suspicion before opening proceedings (art. 26 Cartel Act).

If so, do the interested parties (for instance, the complainant or the company under investigation, or any affected third party) know about the existence and scope of the preliminary investigation, or does it remain it completely secret?

According to art. 26 III Cartel Act, the preliminary investigation procedure does not imply the right to consult files. Therefore, the beginning of a preliminary investigation remains generally secret. Sometimes, though, Comco issues a press release.

- 2.2 What powers does the competition authority enjoy in the context of a preliminary investigation?

In a general way, the Cartel Act (art. 39) does not establish different powers in the context of a preliminary investigation from other investigations. However, far-reaching measures like dawn raids (art. 42 Cartel Act) are usually carried out only within the context of formal proceedings.

- 2.3 Must the competition authority start a preliminary investigation by means of a formal decision?

No.

If so, who is the addressee of this decision?

N/a.

Must the competition authority inform other bodies, entities, authorities, of its decision to launch a preliminary investigation?

No.

Is this decision published (publication of a press release, for example)?

N/a.

Is the press generally informed of such decisions?

No.

- 2.4 (1) Under which circumstances can competition authorities close a preliminary investigation?

There are no formal rules in that respect. Generally, if there are no signs of an unlawful restraint of competition (art. 27 I Cartel Act), the Secretariat will close the investigation.

(2) Is the investigation closed by a formal decision or an informal letter?

Preliminary investigations are not formal procedures (art. 26 Cartel Act). There will never be a formal closing decision. Usually, the investigation is "closed" by issuing a simple letter.

(3) Is the competition authority required to state the reasons for its decision to close a formal investigation?

There is a general obligation (art. 35 I Federal Administrative Procedure Act) (which applies also to cartel procedures) to state the reasons for closing a formal investigation.

(4) Are parties interested to the preliminary investigation (for instance, the complainant, the company under investigation or any affected third party) informed before the adoption of such decision and, where this is the case, are they given an opportunity to formulate observations?

There are no formal rules requiring informing parties interested in a preliminary investigation before the investigation is closed. Parties even do not have access to the file (art. 26 III Cartel Act). However, authorities will generally inform complainants and the parties under scrutiny.

(5) Is this decision made public?

Generally, the Secretariat and the Commission shall inform the public of their activities (art. 29 Cartel Act). As far as preliminary investigations are concerned, the authority will usually refrain from making the decision public unless there is a public interest to do so.

(6) Can this decision be challenged (through appeal or annulment proceedings, for example)?

No. According to art. 44 Federal Administrative Procedure Act, an appeal may only be filed against formal decisions.

(7) If this is the case, before which authority/court and by who can this decision be challenged?

N/a.

(8) What is the review standard applicable to the decision to close a preliminary investigation (marginal or extensive review)?

N/a.

2.5 Can the competition authority keep the records of a preliminary investigation dormant?

Yes.

Could you provide an estimate of the number of dormant files pending before your authority?

No. Nevertheless, experience shows there are only a limited number of dormant files.

Can the competition authority be sued for failure to act if it fails investigate a potential infringement for too long a time?

According to case law, there is no entitlement that authorities open an investigation (source: DPC 2003/3, p. 676 s.; DPC 2004/2, p. 635; DPC 2008/2, p. 361 ss). However, general principles state that everybody may file a complaint with Comco's supervising authority whenever the latter one does not take appropriate steps (art. 71 Federal Administrative Procedure Act). Such actions have however no practical relevance in Switzerland.

### 3. The Opening of the Formal Investigation – Procedural Issues

- 3.1 Must the competition authority open a formal investigation by means of a formal decision? If so, who is the addressee of this decision? Within the competition authority, which officials are ultimately competent to adopt such decisions?

Generally, the Secretariat will open an investigation with the consent of a member of Comco's presiding body (Art. 27 I Cartel Act). A letter will be sent informing the parties being subject to Comco's investigation. According to case law, this is not a formal decision (source: DPC 1998/4, p. 665 s.; DPC 2004/2, p. 636 s.).

Is this decision made public?

Yes, the Secretariat gives notice of the opening of an investigation in an official publication (Art. 28 I Cartel Act).

Can this decision be challenged, (through appeal or annulment proceedings, for example)?

No. According to case law, an undertaking cannot challenge the decision to open proceedings against it because there are no formal decisions with legal effects (source: DPC 1998/4, p. 665; DPC 2004/2, p. 636).

If this is the case, before which authority/court and by who can this decision be challenged? What is the review standard applicable to the decision to open a formal investigation (marginal or extensive review)?

N/a.

- 3.2 Under which circumstances can the authorities close a formal investigation? Is the investigation closed by a formal decision or an informal letter? Are the competition authorities required to state the reasons for their decision to close a formal investigation?

Generally, if there are no signs of an unlawful restraint of competition, Comco will close the investigation by a formal decision. There is a general rule to state the reasons for closing a formal investigation obligation according to art. 35 I Federal Administrative Procedure Act, which applies following art. 39 Cartel Act to all cartel procedures.

Are the interested parties (for instance, the complainant, the company under investigation or any affected third party) informed before the adoption of such decision and, where this is the case, are they given an opportunity to formulate observations?

According to art. 30 II Cartel Act, participants in the investigation may furnish their opinions on the Secretariat's proposal in writing (statement of objections). Those procedural rights are granted even if the authority intends to close the procedure.

Is this decision it made public?

Yes. The competition authorities may publish their decisions (art. 48 I Cartel Act).

Can this decision be challenged (through appeal or annulment proceedings, for example)?

Yes (appeal).

If this is the case, before which authority/court and by who can this decision be challenged? What is the review standard applicable to the decision to open a formal investigation (marginal or extensive review)?

Appeals against decisions of the Commission or its Secretariat may be lodged with the Federal Administrative Tribunal (FAT). Everyone allegedly affected by Comco's decision may appeal (art. 48 Federal Administrative Procedure Act). FAT has the power to extensive review (Art. 49 Federal Administrative Procedure Act).

- 3.3 Can the competition authority keep the records of a formal investigation dormant? Could you provide an estimate of the number of dormant files pending before your authority? Can the competition authority be sued for failure to act if it leaves the formal investigation pending for too long a time?

No, for the time being, there is no such thing like formal investigations with dormant files.

#### **4. Substantive Criteria Governing the Initiation/Termination of a Preliminary Investigation**

- 4.1 Does the law or the case-law lay down criteria that should guide the competition authority's decision to initiate a preliminary investigation? Is there any formal or informal guidance in this regard?

1) The competition authorities enjoy a broad discretion. There are no formal rules. However, at the beginning of every year, Competition Authorities fix their annual priorities which usually contain such criteria (for instance: bid rigging cases in 2008).

2) Comco shall open an investigation in all events if asked to do so by the Department (i.e. Ministry of Economic Affairs) (art. 27 I Cartel Act). That has not happened yet in more than 10 years.

- 4.2 To what extent may a change in the prevailing economic conditions (including the emergence of an economic crisis), induce the competition authority to (i) reshuffle its sectoral investigation priorities; and (ii) recalibrate the intensity of its interventions on the basis of the competition rules (hardening or softening)?

There are no specific guidelines. According to art. 27 II, Comco shall determine the order in which investigations that have been opened should be conducted. This gives Comco enough flexibility to change priorities with respect to a change of the economic situation

but it is not clear if and in which way it will do so.

- 4.3 Does the existence of a sector-specific regulatory and institutional framework (e.g. the regulation of electronic communications) influence, in one way or another, the investigation priorities of the competition authority?

As far as a certain business conduct in certain business sectors (telecom; energy-sector) becomes subject to sector-specific regulation, Comco will generally not investigate such activities. Rather, it leaves this task up to the competent sector-specific surveillance authority, for instance to the communication commission.

- 4.4. Does the competition authority have to give reasons for the opening or closing of a preliminary investigation?

No.

- 4.5 Does the law or the case law lay down the criteria that should guide the authorities' decision to close or discontinue a preliminary investigation (or, in the alternative, the decision to open a formal investigation file)? Is there any formal or informal guidance in this regard?

See the answer to question 4.1.

- 4.6 What are those criteria? To what extent are they discretionary? If so, how is discretion defined in your country? Does your national law distinguish between a discretionary and an arbitrary decision, or similar?

According to case law, Comco enjoys a broad discretion. Case law suggests however that Comco shall open an investigation if there is a public interest in protecting competition and may refrain from doing so if there are only individual interests of particular undertakings at stake (source: DPC 299/3, p. 676 s.).

- 4.7 What are the limits to any such discretionary powers?

The limit is arbitrariness. Comco must not act without reasons or for reasons not in compliance with its duty to protect free competition.

## 5. Substantive Criteria Governing the Opening/Termination of a Formal Investigation Procedure

- 5.1 Does the law or the case-law provide for criteria that should guide the competition authority's decision to start a formal investigation? Is there any formal or informal guidance in this regard?

The initiation of any investigation is discretionary. If there are signs of an unlawful restraint of competition, Comco shall however open an investigation (art. 27 Cartel Act).

- 5.2 Must the competition authority open or close a formal investigation procedure in all circumstances?

See the answer under 3.2.

- 5.3 Must the competition authority provide reasons for opening or closing a formal

investigation procedure? What is the rationale behind the opening of the formal investigation procedure (evidence gathered is deemed sufficient, priority-setting, etc.)?

Opening an investigation: No reasons need to be provided. The rationale behind the opening of an investigation procedure is public interest, evidence provided by complainants or leniency applicants combined with priority-setting of Comco. However, Comco has to make public the opening of an investigation in an official publication. Such notice shall state the purpose of the investigation and the parties concerned (art. 28 Cartel Act).

Closing an investigation: see answer under 3.2.

- 5.4 Does the law or the case-law provide for criteria that should guide the competition authority's decision to close or discontinue a formal investigation procedure? Is there any formal or informal guidance in this regard?

According to Case law, in the absence of public interest or evidence, Comco will stop the investigations (source: DPC 2003/3, p. 676 s.; DPC 2008/1, p. 9 s.).

- 5.5 What are those criteria? To what extent are they discretionary? If so, how is discretion defined in your country? Does your national law distinguish between a discretionary and an arbitrary decision, or similar?

The competition authorities enjoy a broad discretion. In practice, Comco will close a case if there is a) no public interest or if there is b) not enough evidence for an infringement (source: DPC 2008/1, p. 9 s.). Limits are set down by the general rule prohibiting arbitrary decision (art. 46a Federal Administrative Procedure Law).

- 5.6 What are the limits to the competition authority's discretionary powers?

See the answer to the questions under 4.7/5.6.

- 5.7. Can the competition authority close formal investigations by taking *positive decisions* that declare the competition rules inapplicable, whether by formal decision or through *sui generis* acts (guidance letters, etc.)? Has the competition authority ever made use of this possibility?

Basically, Competition law does not provide for such a possibility.

- According to art. 3 Cartel Act, Comco has no power to investigate markets where provisions of law do not allow competition for certain goods or services, including e.g. provisions which establish an official market or price system, or take under scrutiny effects on competition that result exclusively from laws governing intellectual property. In this context, Comco can re-state the inapplicability of competition rules. It has to be noted that if competition rules are inapplicable, it is likely that this would be found out within the preliminary investigation, and the formal proceedings would not be started.

- Generally, Comco has no power to declare unilaterally competition rules inapplicable.

## 6. Negotiated Termination of Proceedings – Settlements and Commitments

- 6.1 Does your national legal order provide for the negotiated termination of investigation proceedings?

Yes.

1) According to article 28 Cartel Act, if the Secretariat considers that a restraint of competition is unlawful, it may propose an amicable settlement to the enterprises involved by way of removing the restraint. Such settlement shall be in writing and must be approved by the Commission. Those settlements are most likely to be compared to **commitments** in other jurisdictions.

2) Comco implemented **settlement** procedures for the first time in 2006. It is, however, not clear yet if the Cartel Law provides the required legal framework for such settlements.

6.2 Is such a system of negotiated termination of proceedings based on (i) the adoption of a formal decision finding an infringement with a discounted fine in exchange for a guilty plea (so-called “*settlement*” procedure); (ii) the adoption of a decision terminating proceedings (no finding of infringement) in exchange for certain commitments previously negotiated with the authority (so-called “*commitments*” decisions); (iii) both; or (iv) other?

(iii). See also answer under 6.1.

6.3 What are the requirements and limits for such negotiated termination? What is the authorities’ margin of discretion to accept or refuse to engage in either of these negotiated termination procedures?

Requirements for a commitment/settlement procedure are the assessment regarding the suitability of a case and the assurance that the commitment will avoid further infringements. In practice, Comco would not take up commitment negotiations if it already intends to impose a fine (hardcore cartels).

6.4 In the context of a procedure leading to the negotiation of *commitments*, what types of remedies may the parties offer to eradicate concerns of unlawful agreement and/or abuse of dominance (behavioral and/or structural)? Can you please provide an overview of the record of your competition authority in the field of commitments decisions?

Both behavioral and structural are viable commitments. Two commitment cases and one settlement case became well-known throughout Switzerland:

1) In the **watch industry**, the investigation into ETA S.A. Manufacture Horlogère Suisse (hereinafter: ETA), a subsidiary of the Swatch Group, was concluded with the finding that ETA was abusing its dominant position. ETA has had the intention to discontinue its supply of “ébauches” (movement blanks) from January 2006 and thereafter to supply only fully assembled watch movements (“phasing-out”). The investigation revealed that ETA held a dominant position in the market for Swiss-made mechanical ébauches up to a unit price of CHF 300.00. The termination of supplies has to be regarded as an unlawful refusal to do business and therefore as an abusive practice. For numerous competitors, the implementation of the phasingout within such short a time in practical terms meant that they had been deprived of the basis for their business activity, as there was no alternative supplier. In a **commitment**, ETA has undertaken to supply the “ébauches” until the end of 2008 at the current volume and thereafter for two further years at a reduced volume. This will create a situation in which alternative production plants may be set up (source: DPC 2005/1, p. 128).

2) In relation to **credit cards**, Comco approved a **commitment** valid for 4 years jointly

given *inter alia* by UBS and Credit Suisse. Consequently, the Domestic Multilateral Interchange Fee (DMIF) has been reduced by 0.2%. This reduction has had an effect both on the acquiring side and on the issuing side. On the acquiring side, the merchant service charges have, according to the merchants associations, been reduced by acquirers. On the issuing side, cost pressure has forced the issuers to design innovative business models that have improved competition in the issuing market and facilitated the introduction of five new low-cost credit cards (source: DPC 2006/1, p. 65)

3) In the investigation against the operator of Zurich Airport (**Unique**), Comco concluded that Unique had abused its dominant position in relation to airport parking. Precisely, Unique, as part of the reorganisation of parking services in the airport area, had terminated the contracts of two independent providers of valet-parking services. Comco imposed a fine. Because Unique was cooperative in the final stages of the investigation, entered into a contractual agreement with the injured parking providers and reached a **settlement** with the Secretariat, the Competition Commission chose not to impose the maximum fine (source: DPC 2006/4, p. 625).

- 6.5 In the context of a procedure leading to the negotiation of *commitments*, does the decision to accept commitments limit the competition authority's subsequent freedom to re-open proceedings? How does the competition authority ensure compliance with its commitments decisions (*e.g.* reporting obligations, etc.)?

1) Should a significant change have occurred in the legal or factual circumstances, Comco may, on a proposal from the Secretariat or the interested parties, revoke or amend its decision (Art. 30 III Cartel Act).

2) Monitoring the compliance with a commitment decision can be outsourced to professional auditing companies.

- 6.7 Is the decision to negotiate the termination of proceedings made public?

Generally not.

- 6.8 To what extent must the final decision be reasoned in the context (i) of a settlement procedure; and (ii) of a commitments procedure? Is the final decision published and, if so, does it provide an accurate, and exhaustive, factual and legal analysis?

1) There is basically no difference between traditional procedures and settlement/commitment procedures. All decisions have to be reasoned (see answer under 3.2). However, in both cases - especially in commitment cases - Comco has to assess if the commitments are able to remove the harm or obstacles to competition.

2) The Cartel Act foresees an obligation to publish all decisions taken by Comco (art. 48 Cartel Act). Publications shall have regard to the legitimate interest of undertakings in the protection of their business secrets (art. 16 Cartel Act).

- 6.9 To what extent can such decisions be challenged, by whom and on what grounds? What is the review standard applicable to such decisions (marginal or extensive review)? Have such decisions already been challenged? Can you give an overview of the key judgments in this area?

1) Appeals against decisions of the Commission or its Secretariat may be lodged with the Federal Administrative Tribunal (FAT). Everyone allegedly affected by Comco's decision

may appeal (art. 48 Federal Administrative Procedure Act). FAT has the power to extensive review (Art. 49 Federal Administrative Procedure Act).

2) Negotiated settlements or commitments have not yet been challenged. The reason might be that even settlements/commitments are subject to a market test.

- 6.10 Negotiated procedures are often said to generate significant administrative efficiency benefits. Can you provide figures of the average duration of (i) settlement and (ii) commitments procedures, as opposed to conventional antitrust procedure?

No such data available. However, experience shows that a negotiated procedure reduces the duration by more than 30%.

## 7. Sector Inquiries

- 7.1 Does your law establish a sectoral inquiry procedure which targets certain branches of industry as a whole?

No. There are no specific provisions. Comco will act according to the general rules.

Which authority is competent to conduct a sectoral inquiry?

Comco and its Secretariat.

- 7.2 Are there mandatory criteria for the initiation of a sectoral inquiry? What is the margin of discretion of the authority when it comes to the launching of a sectoral inquiry (for example, does it have to carry out an *ex ante* impact study)?

No.

Can the decision to open a sectoral inquiry be challenged (through appeal or annulment proceedings, for example)? If this is the case, before which authority/court and by who can this decision be challenged? What is the review standard applicable to such decisions (marginal or extensive review)?

No.

- 7.3 Can you indicate which sectors have so far been the subject of such inquiries and, if so, whether it is possible to draw general conclusions as to the markets that are prone to be subject to a sectoral inquiry?

There have been two sector inquiries in the past years:

1) In the **insurance sector**, 2003 saw the termination of a sector investigation on buildings insurance policies. Although the risk-adjusted premiums of the private buildings insurance companies were on average higher than those of the cantonal buildings insurance monopolies in the period from 1990 to 2000, no indications of an unlawful restraint on competition by the private buildings insurance companies were established. Possible reasons for the difference in premiums are higher marketing and acquisition costs for private insurance companies and the fact that the risk capital of the buildings insurance monopolies in contrast to that of the private insurance companies does not have to be paid off (source: RPW/DPC 2003/4, p. 741).

2) **Interest rates for consumer credits** tend to be higher in Switzerland than abroad. Comco decided to conduct an investigation into the market for consumer credits in Switzerland. The sector inquiry concerned the competitive relations in Switzerland between providers of consumer credits as well as the information activities of the only two credit databases. At the end, it was noted that the average rate of interest for consumer credits had fallen in Switzerland to the level of previous years. At the same time, the leading company in the sector has lost parts of the market and new players have entered the market, thus stimulating competition. In the field of credit databases, there was no indication of any restraint of competition. Such databases can be favourable to competition if new providers can access them easily and without discrimination in order to benefit from having a level playing field with their competitors (source: RPW/DPC 2007/3, p. 364).

- 7.4 What powers of investigation does the competition authority have within the framework of a sectoral inquiry? Do companies have to comply with measures taken pursuant to an inquiry?

In the course of the sector investigation, Comco may use all the tools the Cartel Act provides for regular investigations (art. 39 to 42 Cartel Act).

- 7.5 What types of measures does the competent authority take upon completion of a sector inquiry (publication of reports, adoption of formal decisions, remedial orders, legislative/regulatory proposals, etc.)? In practice, have sector inquiries in your country been followed by public intervention, be it on the basis of the competition rules, or on other grounds?

Comco may publish a report on the results of the investigation and may invite third parties to comment. At the same time, Comco may take actions against individual undertakings (art. 30 Cartel Act).

- 7.6 Could you identify the main practical shortcomings/advantages of sector inquiries for firms and their counsels, as well as for competition authorities?

N/a. Switzerland does not have specific provisions for sector inquiries.

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