

**Question A: The consistency of transactional resolutions of antitrust proceedings (such as settlement processes, leniencies, transactions, commitments, and amicable agreements) with the due process and fundamental rights of the parties**

## 1. Introduction

The discussion about transactional resolutions in Switzerland concerns a dynamic field characterized by constant conflicts and compromises, where the possibilities of the state actions in administrative law have to be balanced against benefits in the areas of fact-finding and the efficient handling of actual or potential proceedings.

Although the administrative contract as instrument of good collaboration between the state and undertakings is generally permitted, the traditional form of state actions in administrative law is the execution of sovereign power by rulings and decisions (*Verfügung*). From a constitutional point of view the use of contractual and negotiation elements is not unproblematic. Settlements between undertakings and the competition authority raise problems with regard to the principle of legality, the legal equality, legal protection of third parties and the inquisitorial principle (*Untersuchungsgrundsatz*). On the other hand settlements can also lead to considerable benefits, such as a more efficient and flexible resolution of cartel investigations with smaller administration efforts and a reduction of appeals. If a fair negotiation process is established, not affected by the mere threat of a higher fine in case of a decision, settlements could also lead to a higher acceptance by the legal subjects, i.e. the undertakings involved in a cartel or abuse of dominance investigation or a merger control procedure.

In the EU the subject was addressed with the Regulation (EC) N°1/2003. First, commitment decisions were adopted on the basis of article 9 in order to bring suspect behaviour to an end. More recently – in June 2008 – settlement decisions were introduced for cartel cases.

In Switzerland already the Federal Act on Cartels and other Restraints of Competition (hereinafter CartA) of 1995 established the institution of the amicable settlement as it can still be found in the code until today.

The partial revision of the CartA in 2003 (in force as per 1 April 2004) was not only considered as a paradigm shift in Swiss competition law, but – by implementing direct sanctions for certain restraints – it also influenced the environment regarding transactional resolutions. Furthermore, the revision established new instruments of transactional resolutions, such as a leniency program and opposition proceedings (*Widerspruchsverfahren*) promising a better enforceability of competition law in the future.

Other than in other jurisdictions, in Switzerland the different forms of transactional resolutions in antitrust proceedings do have clear legal basis in the CartA. Therefore, conflicts with the due process and fundamental rights of the parties might be less severe, at least in principle...

## 2. Transactional resolutions

### 2.1. Overview of transactional proceedings

When aiming to avoid sanctions resulting from competition law violations, the Swiss CartA provides different collaboration procedures enabling undertakings involved to escape or reduce sanctions or to avoid harmful decisions (such as the blocking of a concentration). These transactional resolutions are accessible in different forms and during different stages of the procedure.

- During a *preliminary investigation* (agreement and abuse of dominance cases) the Secretariat of the Competition Commission (hereinafter Secretariat) may propose or negotiate measures to eliminate or prevent restraints of competition (article 26 CartA).
- Once a *formal investigation* (agreement and abuse of dominance cases) is opened and the Secretariat considers that a restraint of competition is unlawful, it may propose or negotiate with undertakings involved an *amicable settlement* concerning ways to eliminate the restraint (2.1.1).
- If an undertaking assists in the discovery and elimination of a restraint of competition, a sanction may be waived whole or in part (leniency program based in article 49a CartA). It is not clear whether the leniency program is also accessible in abuse of dominance cases or only in agreement cases.
- Transactional elements also exist in the *merger control procedure* where the Competition Commission (hereinafter ComCo) may require the undertakings concerned to make binding proposals (i.e. commitments) as to how effective competition may be restored. Such commitments are subject to negotiations between the authority and the involved undertakings.

#### 2.1.1. Commitments during the preliminary investigation (article 26 CartA)

According to article 26 paragraph 2 CartA the Secretariat may propose measures to eliminate or prevent restraints of competition during a preliminary investigation. This presents a very informal opportunity for the Secretariat to address an issue relevant to competition law, without having to open a formal investigation and thus solve the restraint in a very quick and cost-efficient way.

Also for undertakings involved, collaboration with competition authorities may be very beneficial at this early stage of the proceedings. Through good negotiation techniques and the adaption of the behaviour the opening of a formal investigation and therefore also sanctions often can be avoided.

In the centre of the negotiations between the Secretariat and the undertaking involved is the adaption of the behaviour for the future. If the parties agree upon adaptations in the relevant behaviour they may enter into an amicable agreement stating the commitments made by the undertaking. The agreement can be concluded in writing or orally and is *not subject to an approval by the ComCo*. Accordingly, the binding effect of such an amicable agreement does not exceed the party's obligation to act in good faith.<sup>1</sup>

Corresponding to its informal nature of the preliminary investigation, the parties have no right to inspect the files of the case during the preliminary investigation. The commitments however, do not hinder the competition authorities to open a new procedure, if the undertaking does not adapt its

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<sup>1</sup> BEAT ZIRLICK/CHRISTOPH TAGMANN, Basler Kommentar Kartellgesetz, Basel 2010, paragraph 11 to article 29 CartA.

behaviour according to the agreement or if new evidence about past violations of competition law violations comes to light.

### 2.1.2. Amicable Settlements in investigations (article 29 CartA)

Compared to the commitments during the preliminary investigation (article 26 CartA), article 29 CartA concerns a more formalized mode of the amicable settlement, made only available during the formal proceeding of an investigation. If the Secretariat considers a restraint of competition to be unlawful, it may propose an amicable settlement agreement to the undertakings involved, concerning ways to eliminate the restraint. If such an amicable settlement can be concluded between the Secretariat and the company involved, the agreement has to be put down in writing. The settlement needs to be formally approved by ComCo in order to be binding and in order to bring the investigation to an end.

The content of an amicable settlement can be any measure helping to eliminate a potential restraint of completion according to article 5 and 7 CartA (agreements and abuse of dominance). It does not only cover actions that the companies are no longer allowed to take, but also shows the limits of what is still admissible in order to comply with competition law. Not part of an amicable agreement and not negotiable is the legal qualification and therewith the admissibility or the inadmissibility of a past action and the sanction connected thereto. However, in practice the undertakings negotiate maximum sanctions with the Secretariat. If the ComCo exceeds such maximum sanction in its decision, the binding nature of the settlement agreement falls away.

Even after the undertaking and the Secretariat agreed upon an adaptation of the undertakings behaviour, ComCo still has the possibility and (if required) the duty to inquire further facts and either reject the agreement or accept it and impose a sanction at an amount not agreed upon with the undertaking.

The violation of an amicable settlement is subject to sanctions according to article 50 CartA.

Amicable agreements entered into under article 29 CartA between 1997 and 2013:

Case	Reference	Behaviour	
Swisscom – Centrex	RPW 1998/3, p. 377 ss.	article 7 CartA	
Prix des quotidiens tessinois	RPW 2000/1, p. 16 ss.	article 5 paragraph 3 CartA	
Recommandations de prix romande	RPW 2000/1, p. 25 ss.	article 5 paragraph 3 CartA	
CGE	RPW 2001/1, p. 110 ss.	article 5 paragraph 3 CartA	
SUMRA/Distribution de montres	RPW 2001/3 p. 510 ss.	article 5 paragraph 3 CartA	
Systeme de distribution – Citroën	RPW 2002/3, p. 455 ss.	article 5 paragraph 1 and 2 CartA	
Fahrschule Graubünden	RPW 2003/3, p. 271 ss.	article 5 paragraph 3 CartA	
Vertrieb von Tierarzneimitteln	RPW 2004/4, p. 1040 ss.	article 5 paragraph 1 and 2 CartA	
CoopForte	RPW 2005/1, p. 146 ss.	article 7 CartA	
Kreditkarten – Interchange Fee	RPW 2006/1, p. 65 ss.	article 5 paragraph 3 CartA	
<b>revision 2003 (effective as of April 01 2004) adopting direct sanctions</b>			<b>Sanction imposed?</b>
Flughafen Zürich AG (Unique)	RPW 2006/4, p. 625 ss.	article 7 CartA	✓
Richtlinien VSW	RPW 2007/2, p. 190 ss.	article 7 CartA	✗
Arzneimittelinformationen	RPW 2008/3, p. 385 ss.	article 7 CartA	✓

Séateurs et cisailles	RPW 2009/2, p. 143 ss.	article 5 paragraph 4 CartA	✓
Elektroinstallationsbetriebe Bern	RPW 2009/3, p. 196 ss.	article 5 paragraph 3 CartA	✓
VM Interchange Fees II (precautionary measures)	RPW 2010/3, p. 473 ss.	article 5 paragraph 3 CartA	(✗)
Baubeschläge für Fenster und Türen	RPW 2010/4, p. 717 ss.	article 5 paragraph 3 CartA	✓
Behinderung des Online-Handels	RPW 2011/3, p. 372 ss.	article 7 CartA	✗
Swatch Group Lieferstopp (precautionary measures)	RPW 2011/3, p.400 ss.	article 7 CartA	(✗)
Komponenten für Heiz-, Kühl- und Sanitäreanlagen	RPW 2012/3, p. 540 ss.	article 5 paragraph 3 CartA	✓
Recommandations Immobilier	RPW 2012/3, p. 657 ss.	article 5 paragraph 3 CartA	✓
Vertrieb von Musik	RPW 2012/4, p. 820 ss.	article 5 paragraph 3 CartA	✓
Spedition	RPW 2013/2, p. 142 ss.	article 5 paragraph 3 CartA	✓
Swatch Group Lieferstopp		article 7 CartA	✓

By reference to the chart above it can be said, that the importance, number and content of amicable settlements did not change after the revision in 2003. The introduction of direct sanctions, however, brought the effect, that undertakings have an additional incentive to enter into amicable settlements as they are usually combined with a reduction of the fine.

### 2.1.3. Leniency program

The Swiss leniency program, based in article 49a paragraph 2 CartA, is an investigation tool helping the competition authorities to discover cartels and to gather evidence. The cooperation between undertakings and competition authorities furthermore facilitates the fact-finding procedures and leads to a more time and cost efficient establishment of circumstances of the case.

The Ordinance of 12 March 2004 on Sanctions imposed for unlawful restraints of competition (Cartel Act Sanctions Ordinance, CASO) regulates the conditions and the procedure for obtaining complete or partial immunity from sanctions. ComCo grants an undertaking full immunity from a sanction if it provides information that enables the competition authority to open proceedings, or if it provides evidence that enables the competition authority to establish (evidence) a hard core infringement of competition (article 8 CASO). A reduction from up to 50 per cent shall be granted if the undertaking voluntarily cooperates in proceedings and if it terminates its participation in the infringement of competition law no later than at the time at which it submits evidence. The reduction depends on the importance of the undertaking's contribution to the success of the proceedings (article 12 paragraph 2 CASO). ComCo can reduce the amount of the sanction up to 80 per cent if an undertaking voluntarily provides information or submits evidence on further unlawful restriction.<sup>2</sup>

The eligibility for leniency does not depend on whether the authority has already opened proceedings. If after the opening an undertaking provides evidence that enables the authority to establish an infringement of the CartA it is still eligible for leniency. There is no specific date for the participants to come forward, although, if the competition authority already possesses sufficient evidence to prove the infringement, immunity from a sanction cannot be granted anymore. It is therefore recommendable

<sup>2</sup> Article 12 paragraph 3 CASO.

for undertakings to apply for leniency at an early stage of the proceedings. Further “pressure” for the undertakings results from the fact, that only the first applicant is eligible for full immunity (article 8 paragraph 1 CASO). It may therefore be a matter of minutes deciding on whether an undertaking can benefit from full or only from partial immunity.<sup>3</sup>

## 2.2. Discretion of competition authorities

According to article 29 CartA the Secretariat may propose an amicable settlement to the undertakings involved. It is generally recognized that the initiative for a negotiated outcome can also come from the undertaking.<sup>4</sup> Both sides can either signal a willingness to cooperate or present specific proposals for an amicable settlement. It is also possible that ComCo instructs the Secretariat to work towards an amicable settlement.<sup>5</sup>

Although article 29 CartA states that the Secretariat is not obliged to propose an amicable settlement in every case, procedural efficiency indicates that the Secretariat at least has to signal the willingness to enter negotiations towards such an agreement.<sup>6</sup> If several undertakings are involved in a restraint of competition the Secretariat has to evaluate if negotiations are to be lead independently and individually or in a combined way by acknowledging all the circumstances of the specific case.<sup>7</sup>

Following the negotiations the Secretariat will work out a proposal for the amicable settlement and consult with the undertakings involved. Once the agreement is signed the Secretariat will prepare a draft for a ruling of the ComCo and include the settlement. This document is again brought to the undertaking with the possibility to comment before it is forwarded to the ComCo for a decision.<sup>8</sup>

### *Practical Approach*

According to the inquisitorial principle the burden of proof lies with the competition authorities. The state furthermore has to respect the principle of legality in all its actions. From a practical point of view the competition authorities, however, still have a broad margin of discretion regarding the question whether to open a formal investigation, whether to enter into an amicable agreement and also concerning the content a potential settlement.

In certain cases the competition authorities seemed to exceed the limits of discretion in the past. In the case “Sécateurs et cisailles”<sup>9</sup> ComCo imposed a sanction upon an undertaking for a violation of article 5 paragraph 4 CartA. In order to be accessible to a sanction the behaviour of an undertaking has to *significantly restrict competition* in the relevant market. In the mentioned case, the market share of the

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<sup>3</sup> In the case RPW 2003/3, p. 196 ss. – “Elektroinstallationsbetriebe Bern” the difference between the first and the second applicant was only 75 minutes.

<sup>4</sup> SAMUEL HOWALD, Einvernehmliche Regelungen bei sanktionsbedrohten Verhaltensweisen im schweizerischen Kartellrecht, in sic!, 11/2012, p. 3; BEAT ZIRLICK/CHRISTOPH TAGMANN, Basler Kommentar Kartellgesetz, Basel 2010, paragraph 70 to article 29 CartA.

<sup>5</sup> RPW 2007/2, p. 190 N 20 and 292.

<sup>6</sup> BEAT ZIRLICK/CHRISTOPH TAGMANN, Basler Kommentar Kartellgesetz, Basel 2010, paragraph 73 to article 29 CartA.

<sup>7</sup> MICHAEL TSCHUDIN, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, p. 1020.

<sup>8</sup> Article 30 CartA; MICHAEL TSCHUDIN, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, p. 1020.

<sup>9</sup> RPW 2009/2, p. 143 ss.

undertakings involved was so small, that it remained very doubtful if there was ground for a sanctioning. Nonetheless the competition authorities concluded an amicable agreement with the parties and imposed a sanction.

On the other hand, the competition authorities may be tempted to avoid a potential investigation by entering an amicable agreement at the stage of the preliminary investigation, even though a formal investigation and potentially a sanction would be indicated.<sup>10</sup>

### **2.3. Nature of the legal act concluding, approving, and making binding the settlement**

When working out a settlement, Swiss competition law follows a two-tier system. First, the amicable agreement is concluded between the undertaking and the Secretariat (article 29 paragraph 1 CartA). According to article 29 paragraph 2 it then has to be formulated in writing and approved by ComCo.

The main doctrine qualifies the amicable settlement between the undertaking and the Secretariat as a public-law contract that is bound to the suspensive condition that ComCo approves the arrangement. In response to a motion from the Secretariat and after hearings with the undertakings involved, ComCo decides on the appropriate measures or on the approval of the amicable settlement in a ruling (article 30 paragraph 1 CartA). This means that it can either reject or accept the agreement or suggest necessary changes.<sup>11</sup>

If ComCo accepts the settlement worked out by the Secretariat and the undertaking, it will usually include the amicable settlement to the conclusion of the ruling. As a consequence thereof, the amicable settlement is binding and a violation thereof is punishable according to the articles 50 and 54 CartA.<sup>12</sup>

In cases where ComCo rejects the proposal of the Secretariat, it can also issue a decision in the form of a ruling. For the undertaking a rejection means, that it is no longer bound to the agreement, since the suspensive condition was not fulfilled.

An amendment of the amicable settlement – even if just details are concerned – cannot be concluded alone by ComCo. Such a change would need to be covered by the consent of the undertaking involved. Furthermore ComCo does only have the competence to act through sovereign unilateral rulings. If it considers that an amendment is to be made, it has to send the issue back to the Secretariat, instructing it to work out a different agreement or to resume the investigation without an amicable settlement.<sup>13</sup>

#### **2.3.1. Legal consequences for the parties**

Since an amicable settlement has to pass through a two-tier system, it has to be distinguished between the negotiations with the Secretariat and the approval by the ComCo:

The amicable agreement between the undertaking and the Secretariat may include any measure that helps to eliminate or prevent restraints of competition. By obliging the undertaking to omit or adapt certain behaviour or by defining an admissible scope of action *for the future*, it aims to restore the lawful condition. The parties settle what behaviour is considered lawful and where the limits of what

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<sup>10</sup> This could indirectly be influenced through the depth of the investigation, which also lies in the hands of the competition authorities. Example of amicable agreements that have been concluded in the stage of the preliminary investigation: RPW 2008/3, 382 ss.

<sup>11</sup> BEAT ZIRLICK/CHRISTOPH TAGMANN, Basler Kommentar Kartellgesetz, Basel 2010, paragraph 91 to article 29 CartA.

<sup>12</sup> RPW 2006/4, 667 s. – Unique.

<sup>13</sup> BEAT ZIRLICK/CHRISTOPH TAGMANN, Basler Kommentar Kartellgesetz, Basel 2010, paragraph 95 to article 29 CartA.

is legally permissible are exceeded.<sup>14</sup> As mentioned above, the legal qualification and therewith the admissibility or the inadmissibility of a past practice and the potential sanction connected to the practice cannot be part of an agreement between the undertaking and the Secretariat.

It is however in line with the practice of the Secretariat to apply for a certain maximum sanction level, when submitting the agreement to the ComCo for approval. This motion is usually situated in the preliminary remarks of an amicable agreement.

Since the ComCo so far always stayed within the limits of the sanctions framework suggested by the Secretariat, the legal impact of the suggested maximum sanction was never tested. The role of the proposed maximum sanction should not be underestimated as it plays *de facto* a very important role when negotiating an amicable agreement with the Secretariat. This practice is problematic as it is not foreseen in the CartA that the authority may negotiate the sanction with the undertakings. On the other hand this practice is the result of the needs of undertakings involved in cartel or abuse of dominance investigations. No undertaking would agree to a settlement that leaves one of the most important elements (the level of the sanction) uncovered.

## **2.4. Fundamental and procedural rights of the parties**

### **2.4.1. Procedure**

Proceedings in competition law as part of the administrative law are dominated by the inquisitorial principle. So basically the burden of proof for a restraint of competition lies with the state. Theoretically the proceedings involving an amicable settlement should not be handled differently in this regard. Accordingly, a sanction should only be imposed if the gathered evidence would allow the authorities to convict an undertaking of an unlawful behaviour. In practice however, the reasoning and the gathering of evidence may be less thorough in cases involving amicable settlement.<sup>15</sup>

Specific to the competition law the Federal Administrative Court decided that a court should not impose excessive requirements regarding the credibility of evidence (degree of conviction). Accordingly it is sufficient for a judge to attain preponderant probability instead of a full proof.<sup>16</sup> The reasons brought forward to support this opinion are, however, not convincing and the practice is to be considered problematic from a constitutional point of view.

### **2.4.2. Considerations to be made, when entering an amicable settlement or using the leniency program**

When considering entering an amicable settlement or making use of the leniency program the circumstances of the case at hand have to be taken into account. Even if an undertaking believes not to have violated competition law, it may still be opportune to make use of these institutions.

Entering a transactional resolution (amicable settlement as well as the leniency program) can turn out to be very beneficial for an undertaking: First and foremost the reduction of the sanction can be substantial. The participation in the leniency program can lead to a full immunity from a sanction (article 8 CASO). Also entering into an amicable settlement is considered as cooperative behaviour

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<sup>14</sup> SAMUEL HOWALD, Einvernehmliche Regelungen bei sanktionsbedrohten Verhaltensweisen im schweizerischen Kartellrecht, sic!, 11/2012, p 4.

<sup>15</sup> BEAT ZIRLICK/CHRISTOPH TAGMANN, Basler Kommentar zum Kartellgesetz, Basel 2010, paragraph 49 to article 29 CartA

<sup>16</sup> BVGE 2009/35 “Swisscom Bitstrom”, Consideration 7.4.

and can lead to a reduction of up to 40 per cent of the sanction.<sup>17</sup> At the stage of a preliminary investigation a change in the behaviour may convince the authority not to open a formal investigation.

As a general tendency it can be said that cooperation may be recommended in cases where the facts are comparatively clear and the probability of a fine is high. Also the involvement of several undertakings increases the chance of a finding, since any participant could – at any time – make use of the leniency program, leading to a better traceability of the other participants.

If on the other hand the fact finding is difficult and most of the legal questions remain inconclusive, the undertaking may be better advised not to make concessions in the form of an amicable settlement. In cases, where the undertaking rejects entering an amicable agreement, it is however probable that the Secretariat will resort to more severe measures concerning the fact finding, if the circumstances indicate that the undertaking could be involved in a restraint of competition.

### **2.4.3. Right against self-incrimination and presumption of innocence**

As indicated in the precedent paragraph, proceedings in competition law are dominated by the inquisitorial principle and parties are exposed to an extended duty to provide information. However, the duty to cooperate finds its limits in the right to refuse to testify as it is established in article 16 of the Federal Act on Administrative Procedure (APA) in connection with article 42 of the Federal Code on Federal Civil Procedure. Thereafter a testimony can be refused, if the truthful answer to the question asked can lead to criminal prosecution, severe disadvantages concerning the honour or direct financial damage of the witness or persons close to her.

Where an undertaking is involved in a restraint of competition and intends to make use of the leniency program, according to the heavily criticized practice of the ComCo, it has to make a *commitment of guilt*. Entering into an amicable settlement on the other hand, is not necessarily considered an admission of guilt regarding the investigated restraint of competition.<sup>18</sup> However, it does not seem that a clear practice of the competition authority has evolved regarding this question.

According to the presumption of innocence everybody has to be presumed innocent until proven guilty. Applied to the procedure of the amicable settlement agreements this would mean, that an undertaking could just be charged if the evidence against it would allow a full conviction. In cases of an amicable settlement, where ComCo at least expects that the undertakings involved are not appealing against the agreement they may be tempted to impose a sanction within the applied sanction framework, even if the evidence would not support a conviction.

### **2.4.4. Right to be heard and access to file**

In order to exercise the right to be heard, a party has to be granted access to the relevant files. It can be seen as a prerequisite of the right to be heard. According to established case law, competition law

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<sup>17</sup> Decision of the Federal Administrative Court from the 27 April 2010, B-2977–2007, consideration. 8.3.6.,

<sup>18</sup> The question whether entering an amicable agreement can be considered as an admission of guilt is controversial: See RPW 2007/4, p. 653 ss., where the Federal Administrative Court stated: “the consent to a consensual conclusion of an investigation as well as the acceptance of a sanction can hardly be interpreted differently than the admission of guilt towards a restraint of competition.” The legal qualification can also be influenced by the content of an amicable agreement: Where an agreement contains just a prohibition for a conduct in the future it is more likely that the court will assume an admission of guilt. Where on the other hand just an agreement about future conduct is concluded, it is less likely to be considered as admission of guilt. Compare MICHAEL TSCHUDIN, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, p. 1023 ss.



is subject to increased requirements regarding the principle of accessing the file. Competition authorities are thereafter obligated to inform the parties about current developments of the file in order for them to be able to submit comments thereto.<sup>19</sup>

The issue raising questions in this area is the point in time at which the undertakings have to be granted access to the full file. Even with article 26 paragraph 3 CartA stating, that there is no right to access the file during the preliminary investigation, the competition authorities may still grant partial access, if indicated by the circumstances of the case.<sup>20</sup> Once the formal investigation is opened, the procedure is governed by the APA, granting the parties a general right of full access to the file (articles 26-28 APA). In practice however, parties often do not have full access to the file at the stage of negotiating an amicable settlement. Especially, in cases with leniency applications access to file usually is restricted and not granted immediately.

#### **2.4.5. Right to an equal treatment**

The principle of equality (article 8 paragraph 1 and article 29 paragraph 1 of the Federal Constitution), that that equal undertakings, according to their equality, are to be treated equally, and unequal entities according to their inequality are to be treated differently fully applies to competition law.<sup>21</sup>

There might, however, occur tension regarding the principle of equality, where two undertakings in a very similar position get treated differently. This situation is best shown on an example regarding the leniency program: Article 8 CASO states the requirements for an undertaking in order for it to be granted complete immunity from a sanction. According to paragraph 4a, the full immunity from a sanction shall only be granted if no other undertaking already fulfils the requirements for complete immunity. So if an undertaking entered a leniency program, no other applicant – even if the second application is made just five minutes later – can benefit from a complete immunity from a sanction.<sup>22</sup>

#### **2.4.6. Right to an impartial judge**

According to article 30 paragraph 1 of the Federal Convention and article 6 paragraph 1 of the European Convention for the Protection of Human Rights and fundamental Freedoms (ECHR) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

In its recent decision “PubliGroupe”<sup>23</sup> the federal court decided that sanctions under article 49a CartA are criminal law sanctions in the sense of the ECHR. In consequence, the parties must be granted all related minimal procedural safeguards including access to an impartial judge.<sup>24</sup>

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<sup>19</sup> STEFAN BIGLER, Basler Kommentar zum Kartellgesetz, Basel 2010, paragraph 63 to article 39 CartA; RPW 2006/2, p. 347 ss.

<sup>20</sup> BEAT ZIRLICK/CHRISTOPH TAGMANN, Basler Kommentar zum Kartellgesetz, Basel 2010, paragraph 99 to article 26 CartA.

<sup>21</sup> STEFAN BIGLER, Basler Kommentar zum Kartellgesetz, Basel 2010, paragraph 21 to pre articles 39-44 CartA.

<sup>22</sup> RPW 2009/3, p. 196 ss. – Elektroinstallationsbetriebe Bern. In this case several undertakings were involved. In order to in line with the principle of equal treatment, the competition authorities have to inform all the addressees about the possibility of the leniency program.

<sup>23</sup> BGE 139 I 72 (2C\_484/2010). This decision lead to a controversial discussion in the doctrine and was mostly criticized. Compare GERALD BREI, Kartellrechtsverfahren nach PubliGroupe – offene Fragen und praktische Probleme, SJZ 2014, p. 177.

<sup>24</sup> BGE 139 I 72 (2C\_484/2010).

ComCo as an administrative commission, however, does not meet the requirements stated in article 6 ECHR. It is therefore crucial, whether the procedural safeguards already apply in the first stage of the administrative procedure or if it is enough to grant them in the appeal procedure. By referring to the decision of the European Court of Human Rights in the case *Menarini*, the federal court stated that it is sufficient to grant access to a court that is in conformity with the ECHR in the appeals procedure. This decision is not satisfying for undertakings involved in sanctioning procedures as practice shows that the Federal Administrative Court is reluctant to fully review the decisions of COMCO.

### **2.4.7. Right to trial**

When entering an amicable agreement, in some cases, the Secretariat asks the undertakings to waive the right to appeal under certain conditions or at least to declare the intention that an appeal will not be made. These conditions usually are that the ComCo approves the agreement and stays within the suggested sanctioning framework.<sup>25</sup>

It is recognised that a waiver of the right to appeal cannot be directly legally binding. However, the effects of such a waiver are discussed controversially in the doctrine.<sup>26</sup> An appeal requires a legitimate interest in bringing proceedings. It is doubtful whether such legitimate interest is present after the undertaking has approved a settlement and COMCO remained within the defined limits of such agreement.<sup>27</sup>

## **3. Merger control**

In Swiss merger control procedures, thresholds for an intervention are rather high. Prohibitions of concentrations are very rare (there is only one case so far). However, in many cases undertakings have offered commitments (obligations or conditions) similar to the commitments made during the negotiations of an amicable settlement. Negotiations with the authority in merger control cases imply the risk that undertakings offer more than the authority could actually impose.

### **3.1. Negotiations of remedies**

In an obiter dictum the Swiss Federal Court decided that conditions and obligations, including their terms and conditions, cannot be part of an agreement between the parties. Instead they have to be part of a formal ruling by the ComCo.<sup>28</sup>

In practice however, conditions and obligations are worked out in a dialogic process between the parties and the Secretariat.

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<sup>25</sup> MICHAEL TSCHUDIN, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, p. 1025 s.; SAMUEL HOWALD, Einvernehmliche Regelungen bei sanktionsbedrohten Verhaltensweisen im schweizerischen Kartellrecht, in sic!, 11/2012, p. 5.

<sup>26</sup> MICHAEL TSCHUDIN, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, p. 1025 s. with further references.

<sup>27</sup> Interesting developments could result from a case („Baubeschläge für Fenster und Fenstertüren“) that is currently pending before the Federal Administrative Court.

<sup>28</sup> RPW 2007/2, 329 N 9 - Swissgrid.