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LIDC Congress in Oxford: National Report Switzerland (Question A)

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I. POSITIVE LAW

A. Institutions

1. Which bodies are responsible for deciding the amount of the fine to be paid for an infringement of the competition rules ("infringements")?

In Switzerland, the Competition Commission is the responsible body to decide on the amount of fines for infringements. The Competition Commission is an independent federal authority affiliated to the Swiss Ministry of Public Economy and currently consists of 12 members. The majority of the members of the Competition Commission are independent experts, usually law or economic professors[1]. The Competition Commission is located in Berne. The cases brought before the Competition Commission are prepared and processed by the Secretariat of the Competition Commission which acts as the investigative body. The Secretariat of the Competition Commission also proposes the amounts of fines for infringements to the Competition Commission. The Secretariat of the Competition Commission has around 50 employees, most of them lawyers or economists.

2. What procedural rules are there that govern the determination of fines (e.g. opportunity for the undertaking to comment on the level of fines or matters relevant to the assessment of fines; any requirements that the level of fines is determined by a person other than the person responsible for investigating the infringement)?

The procedural rules that govern the determination of fines are laid out in the Federal Act on Cartels and other Restraints of Competition ("**CartA**") and in the Ordinance on Sanctions for Unlawful Restraints of Competition ("**Ordinance on Sanctions**").

Following Article 49a(1) CartA, the Competition Commission may only impose fines against an undertaking if, following a formal investigation, it finds that the undertaking has participated (i) in a horizontal agreement on prices, quantities or territories or in a vertical agreement regarding fixed or minimum prices or in distribution contracts prohibiting passive sales or (ii) has abused of a dom-

[1] See website of the Swiss Competition Commission www.weko.admin.ch.

inant position. The decision of the Competition Commission is based on a proposal of the Secretariat of the Competition Commission. This proposal or draft decision also includes a calculation of fines. Before the Competition Commission takes a decision based on the draft decision of the Secretariat of the Competition Commission, the draft decision is addressed to the parties. The parties can then comment on the entire draft decision including the proposed fines.

3. Is it possible to appeal against the amount of the fine to an independent judicial tribunal?

Yes. Decisions by the Competition Commission are subject to appeal to the Federal Administrative Court (Articles 5, 44, 47 of the Federal Act on Administrative Procedure ("**AAP**") and Article 31 et seqq. of the Federal Act on the Administrative Court). The Federal Administrative Court has full review powers (Article 49 AAP). Hence, the right of appeal includes the appeal against the amount of the fine.

If so:

a) On what grounds may such an appeal be brought?

According to Article 49 AAP the appellant may in an appeal contend that (i) there has been a violation of Swiss federal law including the exceeding or abuse of discretionary powers; (ii) there has been an incorrect or incomplete determination of the legally relevant facts of the case or (iii) the decision is inadequate.

b) What approach is adopted by the appeal tribunal (e.g. is the appeal confined to correcting errors of law or manifest errors of appreciation, or is it a redetermination of the fine *de novo*)?

As explained above, the Federal Administrative Court enjoys full review powers. Hence, it can redetermine the fine *de novo*. So far, the Federal Administrative Court has only issued one decision in which it upheld an appeal against a cartel sanction. In this decision, the Federal Administrative Court repealed the sanction imposed by the Competition Commission[2].

[2] Judgement of the Federal Administrative Court of 24 February 2010, B-2050/2007 - mobile termination fees.

c) Does the appeal tribunal have power to increase the amount of the fine, and, if so, when is that power used?

There is no prohibition of *reformatio in peius* in proceedings before the Federal Administrative Court. According to Article 62 AAP the Federal Administrative Court may amend the contested decision to the prejudice of a party. It can therefore increase the amount of the fine. However, it can only do so if the contested decision (i.e. the calculation of the fine) violates Swiss federal law or is based on an incorrect or incomplete determination of the facts of the case (Article 62(2) AAP).

d) Is there a right of further appeal to a superior court, and if so on what grounds?

Decisions of the Federal Administrative Court can be appealed before the Federal Supreme Court. Following Article 95 of the Federal Act on the Federal Supreme Court such an appeal must be lodged on the basis of a violation of the law.

B. Rules governing the assessment of fines

1. Are there any rules that permit or require fines for an infringement committed by an undertaking to be imposed on persons that own, or have a share of ownership or control of, that undertaking? Please describe those rules. How are those rules affected if the ownership of the undertaking has changed between the time of the infringement and the time when a fine is imposed?

If the undertaking is effectively controlled by a parent company, the sanction will be imposed against the controlling parent company[3]. There are no rules and prejudices on the change of ownership of an undertaking that took part in infringements between the time of the infringement and the time when a fine is imposed. However, one can expect that the Swiss competition authorities and courts would follow the EU approach[4] and fine the company that controlled the undertaking at the time of the infringement[5].

[3] Law and Policy on Competition (Official Publication of the Swiss Competition Commission, "**LPC**") 2007/2, p. 200; Tagmann/Zirlick in: Basler Kommentar zum Kartellgesetz, Art. 49a KG, N 98.

[4] See Judgement of the Court of 16 November 2000, Case C-286/98, ECR 2000, I-9925, N 37 - Stora Kopparbergs.

[5] Tagmann/Zirlick in: Basler Kommentar zum Kartellgesetz, Art. 49a KG, N 100.

2. To what extent is the level of fines determined by legislative rules (e.g. prescribing maximum levels of fines/the approach to be adopted in assessing fines)?

The maximum level of fines is determined in Article 49a(1) CartA. According to this provision, the maximum fine amounts to 10 per cent of the group turnover in Switzerland in the three business years preceding the decision. Article 49a(1) CartA states that the amount of the sanction will depend on the duration and on the severity of the unlawful behaviour and that the profit achieved with the unlawful behaviour will also be taken into consideration. The determination of fines is further regulated by the Ordinance on Sanctions. The Ordinance on Sanctions was issued by the Federal Council of Switzerland and contains the methodology for the assessment of fines.

3. Are there guidelines as to the level of fines or as to the methodology to be used in assessing fines?

The level of fines and the methodology to be used in assessing fines are laid out in the CartA and in the Ordinance on Sanctions. Both are legally binding for the authorities and the courts. There are no guidelines as such but the Competition Commission has issued so-called Explanatory Notes on the Ordinance on Sanctions[6]. These Explanatory Notes are not binding for the Federal Administrative Court, the Federal Supreme Court or civil courts.

4. To what, if any, extent is the competition authority, or a judicial tribunal hearing an appeal, required in determining the level of fines to apply a consistent approach to different undertakings involved in the same infringement?

An inconsistent approach to different undertakings involved in the same infringement could amount to a violation of the requirement of equality before the law. This requirement is laid out in Article 8 of the Swiss Federal Constitution and includes the duty for authorities and courts to respect equal standards when assessing similar facts. The violation of the requirement of equality before the law constitutes a breach of Swiss federal law and may be subject to an appeal.

5. To what, if any, extent is the competition authority, or a judicial tribunal hearing an appeal, required in determining the level of fines to have regard to the level of fines imposed for similar competition infringements in previous cases?

An appeal on the grounds of a violation of equality before the law can be brought before the Swiss Federal Administrative Court and subsequently before the Federal Supreme Court.

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[6] „Erläuterungen zur KG-Sanktionsverordnung“, available at www.weko.admin.ch.

6. To what, if any, extent is the competition authority, or a judicial tribunal hearing an appeal, required in determining the level of fines for competition infringements to have regard to the level of fines imposed on corporate bodies for other serious economic crimes or infringements (e.g. in the areas of fraud/environmental law/consumer protection)?

Within the legal framework of the CartA and the Ordinance on Sanctions, the authorities that apply the law have wide discretionary powers. However, as explained above (see B.4), the Competition Commission and the Federal Administrative Court are bound by the constitutional right to equality before the law and must apply equal standards to similar facts. The violation of this right can be brought forward on appeal. It may prove very difficult, however, for a party to demand equal treatment based on similarities with cases where fines were imposed for other economic infringements.

7. To what, if any, extent is the competition authority, or a judicial tribunal hearing an appeal, in determining the level of fines for competition infringements, required or permitted to take into consideration the amount of fines already imposed (or likely to be imposed) on the same corporate body or bodies for the same infringement(s)?

The Swiss Competition Commission is not required to take into consideration the amount of fines already imposed on the same undertaking for the same infringements. However, according to the Explanatory Notes of the Competition Commission for the Ordinance on Sanctions (Explanatory Notes on the Ordinance on Sanctions), the principle of proportionality (laid out in Article 2(2) of the Ordinance on Sanctions) includes the possibility to take into account fines which were paid for the same infringement abroad[7].

8. To what, if any, extent is the competition authority, or a judicial tribunal hearing an appeal, required or permitted, in determining the level of fines for competition infringements by a corporate body, to impose higher fines where neither it nor other state instrumentalities have the power to punish wrongdoing individuals acting on behalf of the enterprise?

It is neither required nor explicitly foreseen that the competition authority or the Federal Administrative or the Federal Supreme Court shall impose higher fines because there are no direct sanctions against individuals (i.e. sanctions against individuals for competition infringements) under Swiss competition law.

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[7] See Explanatory Notes to the Ordinance on Sanctions, p. 2.

9. To what extent do the procedures used to determine the amount of the fine reflect procedures used in national law to determine penalties or fines payable by corporate bodies for other types of economic crimes/infringements (such as fraud/environmental law/consumer protection)?

Most "other economic crimes or infringements" such as e.g. infringements of environmental rules are governed by special legal provisions. These provisions focus on the imposition of penalties on natural persons. Infringements which are prosecuted by Federal Authorities (such as e.g. environmental law infringements) are governed by the Swiss Act on Administrative Criminal Law ("**AACL**"). Under the AACL, fines against undertakings are clearly the exception and, following Article 7 AACL fines shall only be imposed on undertakings if the fines amount to less than 5,000 Swiss Francs and if the fining of natural persons (i.e. the executives of the company) required investigatory measures that would be disproportionate with the amount of the fine.

The Swiss Penal Code ("**SPC**") in Article 102 provides with a corporate criminal liability and determines a maximum fine of 5 Mio Swiss Francs for felony or misdemeanour committed in the exercise of the corporate body's commercial activities in accordance with its object where it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the corporate body. This article would apply to "normal" crimes by undertakings such as e.g. embezzlement, forgery or fraud. Under Article 102(1) SPC undertakings are in principle only sanctioned if a sanction that was normally imposed against a natural person can not be imposed against this person because of the inadequate organisation of the undertaking. Article 102(2) SPC lists special crimes for which an undertaking can be sanctioned irrespective whether a natural person would normally be sanctioned. Such crimes include financing terrorism, money laundering, bribery of Swiss public officials, granting an advantage to officials and bribery of foreign public officials.

Sanctions that are imposed for such infringements are calculated on the basis of the seriousness of the offence, the seriousness of organisational inadequacies and the loss or damage caused and based on the economic ability of the undertaking to pay the fine (Article 102(3) SPC).

The procedure used to determine the amount of a fine for a competition infringement follows the rules described in the CartA and the Ordinance on Sanctions. There are obvious similarities between the provisions of the Ordinance on Sanctions and the principles laid out in Article 102(3) SPC. Both mainly consider the seriousness of the offence. Further, the economic ability of the undertaking to pay the fine is in the calculation of fines for competition infringements reflected by the fact that the fine is calculated on the basis of the turnover of the undertaking and by the explicit reference in the Ordinance on Sanctions to the principle of proportionality. The main difference, however, is that Article 102 provides with a maximum absolute fine (5 Mio Swiss Francs while Article 49a CartA only provides with a maximum relative fine (10% of turnover of the last three years).

10. Is there any evidence that the procedures used to determine the amount of the fine in anti-trust cases are not consistent with constitutional/international human rights standards?

After the introduction of the sanction regime in the CartA, the Swiss Competition Commission has been criticised for its organisational structure. The Competition Commission constitutes a uniform body and there is no differentiation between investigation and prosecuting on the one hand and decision taking on the other hand. Many practitioners have regarded this as contrary to the right to an independent tribunal according to the Swiss Federal Constitution and the European Convention on Human Rights but so far, there has been no final judicial decision on this. On June 30, 2010, the Swiss Federal Council published a draft bill for an amendment of the CartA. This draft proposes a separation between investigating/prosecuting and decision-taking by means of the creation of a Competition Court.

C. Methodology used in determining the amount of the fine

1. What are the overall objectives of fining policy (e.g. to deter further infringements by the undertaking concerned, further infringements by other undertakings, or, to mark the seriousness of the infringement)?

The main objective of the introduction of direct sanctions was both deterrence and prevention. Sanctions of up to 10 per cent of the group turnover in Switzerland in the three business years preceding the decision should on the one hand provide with a deterrent effect in severe cases and on the other hand give the Competition Commission the possibility to impose sanctions of symbolic character in minor cases[8].

2. Summarise the methodology used to determine the amount of the fine

In a first step, the Competition Commission defines a base amount. Depending on the severity and type of the violation, the base amount can be up to 10% of the turnover of the undertaking in the relevant market in the last three years (Article 3 Ordinance on Sanctions). In order to define the base amount, the Competition Commission first defines the relevant market and then calculates the turnover realised by the undertaking on that relevant market in the last three years. It then assesses the severity of the infringement to define a percentage between 0 and 10%.

[8] See Federal Council Message relating to the amendment of the Act on Cartels of November 7, 2001, Federal Gazette 2002, p. 2037.

In a second step, the Competition Commission assesses the duration of the infringement. If the infringement lasted for between one and five years, it increases the base amount by up to 50%. If the infringement lasted longer than five years, the base amount for each additional year is increased by a supplement of up to 10% (Article 4 Ordinance on Sanctions).

In a third step, the Competition Commission assesses aggravating (e.g. repeated infringements, particularly high profit, refusal to cooperate with the authorities etc.) and attenuating (e.g. passive role, not carried out retaliation measures which had been agreed upon) circumstances (Articles 5 and 6 Ordinance on Sanctions) and increases or reduces the sanction.

3. Does the methodology vary depending on whether the infringement is unilateral (e.g. monopolisation/abuse of dominant position) or multilateral (e.g. cartels)?

No, the methodology is the same for all kinds of infringements.

4. Is there a maximum fine that may be imposed? If so, how is that maximum amount determined?

As explained above (see C.2), the maximum fine amounts to 10 per cent of the group turnover in Switzerland in the three business years preceding the decision.

5. Insofar as the fine depends on the seriousness of the infringement, explain whether and (if so) how the following factors are assessed and taken into account:

- The role played by the undertaking in the infringement is assessed as an aggravating or an attenuating circumstance. If the undertaking (in case of a horizontal or vertical agreement) instigated the infringement or played a leading role, the sanction will be increased (Article 5 Ordinance on Sanctions). If on the other hand, the undertaking played an exclusively passive role and has not carried out measures of retaliation which had been agreed for the implementation of the anti-competitive agreement the sanction will be reduced (Article 6 Ordinance on Sanctions).

- As regards the effects of an infringement, please note that the Swiss CartA follows an "effects based approach" meaning that the Competition Commission must provide evidence that a specific infringement had an effect on the competition in the relevant market. Therefore, an effect is conditional for the imposition of a fine. Further, following Article 2(2) Ordinance on Sanc-

tions the principle of proportionality must be observed for the calculation of a sanction. In this respect, the specific effects of the infringement shall be taken into account for the calculation of the sanction and the Competition Commission will define a lower base amount if the economic effects of the competition infringement are low[9]. Accordingly, significant effects of the infringement will lead to a higher base amount.

- The duration of the infringement is taken into account for the calculation of the base amount. If the infringement lasts for between one and five years, the base amount will be increased by up to 50%. If the infringement lasts longer than five years, the base amount for each additional year will be increased by a supplement of up to 10% (Article 4 Ordinance on Sanctions).

- The persons affected by the infringement (e.g. consumers or vulnerable groups) are in principle not relevant for the calculation of the sanction. However, considering the open form of wording of the Ordinance on Sanctions, it cannot be excluded that the persons affected would be taken into consideration for the calculation of the sanction. However, as far as publicly known, this criterion has never been considered by the Competition Commission for the calculation of the fine.

- The size of the affected market/relevant economic market as such is not taken into account for the calculation of the fine. However, the turnover of the undertaking on the relevant market is the basis for the calculation of the fine.

- The relevant provisions do not explicitly consider the existence of a genuine compliance policy at the time of the infringement as an attenuating circumstance for the calculation of a sanction against an undertaking. Due to the open wording of the Ordinance on Sanctions, compliance programs could under the existing provisions be taken into account as an attenuating circumstance. However, as far as publicly known, compliance programs have never been considered for the calculation of the fine (see also C.11 below). The draft bill for an amendment of the CartA provides that the implementation of compliance programs satisfying highest requirements shall be considered as a sanction reducing circumstance.

- There is no provision according to which the involvement of senior management in the infringement is considered for the calculation of the sanction. Due to the open wording of the Ordinance on Sanctions, it cannot be excluded that the involvement of certain persons would be taken into consideration for the calculation of the sanction. However, as far as publicly known, the criterion as such has never been considered by the Competition Commission for the calculation of a fine.

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[9] See e.g. LPC 2007/2, p. 236.

- Any intention by the undertaking (or employees involved) to harm competition, or recognition that competition would be or would be likely to be harmed: Other than for criminal sanctions, the relevant provisions do not require the Competition Commission to prove an intention by the undertaking or by the persons in charge to harm competition in order to impose sanctions for competition infringements. It is explicitly stated in the Federal Council's message regarding the introduction of direct sanctions in the CartA that fault is not required to impose sanctions[10]. However, in its practice, the Competition Commission assesses the criterion of fault and addresses the question whether the undertaking concerned objectively breached its duty of care. This criterion is usually fulfilled in the case of the participation in a hard-core horizontal or vertical cartel (i.e. an agreement on prices, customers or territories).

- Whether the infringing conduct could reasonably have been regarded as lawful or was of a type not previously found to be an infringement: In principle, the CartA is presupposed to be known by an undertaking and the undertakings have to take all the necessary measures to ensure compliance with the CartA. The fact that an infringement could reasonably have been regarded as lawful or was of a type not previously found to be an infringement would have to be assessed under the question of fault (which is addressed by the Competition Commission, see above)[11].

- As explained above, the leading or subsidiary role played by the undertaking in the infringement is assessed as an aggravating or attenuating circumstance. If the undertaking (in case of a horizontal or vertical agreement) instigated the infringement or played a leading role, the sanction will be increased (Article 5 Ordinance on Sanctions). If on the other hand, the undertaking played an exclusively passive role and has not carried out measures of retaliation which had been agreed upon for the implementation of the anti-competitive agreement the sanction will be reduced (Article 6 Ordinance on Sanctions).

- Previous infringements by the undertaking concerned are taken into account as an aggravating circumstance (Article 5 Ordinance on Sanctions).

6. Insofar as the fine depends on the size or economic power of the undertaking, explain whether and (if so) how the following factors are assessed and taken into account:

[10] See Federal Council Message relating to the amendment of the Act on Cartels of November 7, 2001, Federal Gazette 2002, p. 2034.
[11] See LPC 2010/1, p. 174.

- the turnover of the undertaking in the affected markets serves as the basis for the calculation of the base amount.

- the overall size of the undertaking in the jurisdiction concerned serves as the basis for the maximum fine which is calculated on the basis of the total turnover of the undertaking in the last three years in Switzerland;

- the overall size of the undertaking worldwide is not relevant for the calculation of the fine as both the base amount and the maximum fine are calculated on the turnovers realised in Switzerland;

- other measures of size or economic power such as profitability/assets are not taken into account for the calculation of the fine;

- the turnover of parent companies/subsidiary companies are taken into account for the calculation of the fine. The fine is calculated on the basis of the turnover realised by the group company i.e. by the parent company including subsidiaries.

7. Please describe any adjustment made for "failing firms" (i.e. cases where the undertaking concerned cannot pay the fine or cannot do so without causing damage to innocent third parties such as creditors or employees)? How does the body responsible for determining the amount of the fine deal with cases where a "failing firm" argument is made? Are there any cases where a competition fine has led to the insolvency of an undertaking?

There are no special provisions for failing firms and there have been no cases where a competition fine has led to the insolvency of an undertaking. However, Article 2(2) Ordinance on Sanctions states that the principle of proportionality is to be observed in determining the sanction. According to the Explanatory Notes on the Ordinance on Sanctions, it would be contrary to the idea of the CartA if the intervention of the Competition Commission led to the exit of the market of a financially sound undertaking[12].

8. Is the size/economic power of the undertaking assessed at the time of the infringement or at the time of the fining decision? What happens if the undertaking has grown or shrunk in size since the date of the infringement, or (by reason of acquisitions or divestments) forms part of a larger or smaller group of companies than it did at the time of the infringement?

[12] See Explanatory Notes to the Ordinance on Sanctions, p. 2.

The turnover which, to a wide extent, reflects the size/economic power of the undertaking is relevant for the calculation of the fine. The fine is calculated on the basis of the turnover realised by the undertaking in the relevant market in the three years preceding the decision of the Competition Commission.

9. Insofar as the objective of fining policy is to deter future infringements by the undertaking concerned or other undertakings, how is that objective sought to be achieved?

In the Federal Council's message relating to the amendment of the CartA (the message was issued in the view of the introduction of the sanction regime, see footnote 8), the means of deterring future infringements (besides the introduction of sanctions based on the turnover of the undertaking concerned) were not further discussed. However, decisions on sanctions against undertakings are published on the website of the Competition Commission and announced in press releases. This transparent approach may well enhance the deterrent effect of the sanctions.

10. To what extent is the level of fines affected by the undertaking's co-operation with, or obstruction of, the investigation, or by a decision not to contest the competition authority's allegations? Are such matters taken into account when determining the level of fines on corporate bodies for other serious economic crimes or infringements (e.g. in the areas of fraud/environmental law/consumer protection)?

There is a leniency programme under Swiss competition law. According to Article 49a(2) CartA, a fine may be entirely or partially waived if an undertaking assists in the discovery and removal of the restriction of competition.

Leniency applications may also be submitted for other economic crimes (e.g. tax evasion). However, the sanctions for such crimes are normally incomparable with the sanctions for competition law infringements (see above B.2).

11. To what extent is the level of fines affected by measures taken by the undertaking since the infringement to prevent future infringements (e.g. to introduce a more effective compliance programme) or to compensate victims of the infringement? Are such matters taken into account when determining the level of fines on corporate bodies for other serious economic crimes or infringements (e.g. in the areas of fraud/environmental law/consumer protection)?

It is not foreseen by the law that measures taken by the undertaking since the infringement to prevent future infringements or to compensate victims of the infringements are taken into account for

the calculation of a fine. However, the open wording of the Ordinance on Sanctions leaves room to consider such measures as attenuating. There is only one case in which the Competition Commission has briefly addressed the question whether the introduction of a compliance program after an investigation for competition infringements had been opened could be taken into account for the calculation of the fine. In this case, the Competition Commission explained that it could not see how a newly introduced compliance program can be taken into account for the calculation of a fine for competition infringements that had already taken place[13].

12. Is there any evidence that the level of fines has increased over recent years? If so, to what extent has that been the result of changes in legislative rules or published guidance, or has it resulted from a change in decision-making practice by the competition authority?

As direct sanctions have only been introduced in the CartA as per April 2004, there is only little experience with regards to the development of the level of fines. Considering the fines imposed so far, there is no clear evidence that the fines have increased since the entry into force of the sanction regime. However, one can observe an increase of the number of decisions imposing fines on undertakings over the last three years (also see list of decisions under C.16 below).

13. Compare the methodology used to determine the level of fines for competition infringements by corporate bodies with the methodology used to determine the level of fines imposed for other serious economic crimes or infringements committed by corporate bodies (such as fraud/environmental law/consumer protection).

See B.2 and C.2 above. The methodology is different. The methodology used to determine the level of fines for competition infringements is highly structures (see Ordinance on Sanctions) whereas there is no comparable calculation mechanism for sanctions imposed for other economic infringements. However, both types of sanctions are in the end mainly based on the seriousness of the infringement/crime.

14. To what extent does the methodology used to determine the level of fines for competition infringements by corporate bodies take account of the likelihood of detection of such infringements?

The likelihood of detection of competition infringements should not so much be taken into account for the determination of the fine as such but rather for the determination of the extent of a bonus for a leniency application. If the chance that a competition infringement would have been detected

[13] See decision of May 10, 2010, available at http://www.weko.admin.ch/aktuell/00162/index.html?lang=de.

without a leniency application is higher, the sanction reduction should be smaller than in the case of a low probability of detection.

15. Is there any evidence that the level of fines imposed for competition infringements is out of proportion to the level of fines imposed for such serious economic crimes or infringements?

It is difficult to answer this question as the objects of legal protection are different. Fines for competition infringements are deemed to protect free and effective competition and have to take into account the size of an undertaking.

16. It would be helpful if you could provide a list of the fines imposed in your jurisdiction over the last 10 years and a brief description of the infringement (e.g. price-fixing/information sharing/exclusionary abuse). If that is not practical, could you indicate the range of fines that has been imposed over that period, pointing out any general trends (such as a general pattern of increasing fines)?

- *Flughafen Zürich (Unique) - Valet Parking (decision of the Competition Commission of September 18, 2006)*: Abuse of dominant position through the refusal to grant approvals for parking services at the airport[14]. Flughafen Zürich AG (Unique) was sanctioned with **101,000 Swiss Francs**. This was the first decision in which the Competition Commission imposed a direct sanction against an undertaking. Direct sanctions had only been introduced in the CartA as per April 1, 2004.

- *Swisscom - Terminierung Mobilfunk (decision of the Competition Commission of February 5, 2007)*: Abuse of dominant position through the fixing of too high mobile termination fees by Swisscom Mobile AG[15]. Swisscom Mobile AG was sanctioned with **333 Mio Swiss Francs**. However, the Federal Administrative Court annulled the sanction upon appeal (LPC 2010/2, p. 242 et seqq.). The judgement of the Federal Administrative Court was confirmed by the Federal Supreme Court.

- *Richtlinien des Verbandes Schweizerischer Werbegesellschaften VSW über die Kommissionierung von Berufsvermittlern (decision of the Competition Commission of March 5, 2007)*:

[14] LPC 2006/4, p. 625 et seqq.

[15] LPC 2007/2, p. 241 et seqq.

Abuse of dominant position with regards to commission payments to professional agents by Publigroupe SA[16]. Publigroup SA was sanctioned with **2.5 Mio Swiss Francs**.

- *Publikation von Arzneimittelinformationen(decision of the Competition Commission of July 7, 2008)*: Abuse of dominant position (price discrimination) with regards to the publication of information on medical products by Documed AG[17]. Documed AG was sanctioned with **50,000 Swiss Francs**.

- *Sécateurs et cisailles (decision of the Competition Commission of May 25, 2009)*: Vertical price fixing between the supplier Felco and the distributor Landi with regards to garden clippers and shears sold by Landi (leniency application by Felco)[18]. Felco was sanctioned with **50,000 Swiss Francs** whereas Landi was sanctioned with **5,000 Swiss Francs**.

- *Elektroinstallationsbetriebe Bern (decision of the Competition Commission of July 6, 2009)*: Agreements on prices and customers between eight electric installation companies[19]. The companies were individually sanctioned with fines of up to **395,000 Swiss Francs**. All the companies had submitted leniency applications to the Competition Commission.

- *Preispolitik Swisscom ADSL (decision of the Competition Commission of October 19, 2009)*: Abuse of dominant position (margin squeezing) by Swisscom regarding ADSL services rendered to third parties[20]. Swisscom was sanctioned with **220 Mio Swiss Francs**. The decision of the Competition Commission is currently under appeal before the Federal Administrative Court.

- *Hors-Liste Medikamente (decision of November 2, 2009)*: Vertical price fixing by the pharmaceutical companies Bayer, Eli Lilly and Pfizer regarding three hors-liste pharmaceuticals against erectile dysfunction[21]. The total sanctions imposed against the three pharmaceutical companies amounted to **5.7 Mio Swiss Francs**. The decision of the Competition Commission is currently under appeal before the Federal Administrative Court.

- *Gaba (decision of the Competition Commission of November 30, 2009)*: Vertical Agreement between Gaba (manufacturer of Elmex toothpaste) and Gebro (Austrian licensee of Gaba) re-

[16] LPC 2007/2, p. 190 et seqq.
[17] LPC 2008/3, p. 385 et seqq.
[18] LPC 2009/2, p. 143 et seqq.
[19] LPC 2009/3, p. 196 et seqq.
[20] LPC 2010/1, p. 116 et seqq.
[21] LPC 2010/4, p. 649.

garding the prevention of parallel imports into Switzerland[22]. Gaba was sanctioned with **4.8 Mio Swiss Francs** whereas Gebro was sanctioned with **10,000 Swiss Francs**. The decision of the Competition Commission is currently under appeal before the Federal Administrative Court.

- *Heiz-, Kühl- und Sanitäranlagen (decision of the Competition Commission of May 10, 2010)*: Horizontal agreements regarding the timing and extent of price increases between manufacturers of water management products for heating, cooling and sanitation systems[23]. One of the companies was sanctioned with **169,000 Swiss Francs**. The other enterprise involved in the infringement had filed a leniency application and was granted full immunity.

- *Baubeschläge für Fenster und Fenstertüren (decision of the Competition Commission of October 18, 2010)*: Horizontal agreement regarding a price increase between five window fixture companies active in the market for window and door fittings[24]. The total sanctions imposed against the companies involved in the infringement amounted to **7.6 Mio Swiss Francs** (the individual sanctions ranging from 0 to approximately **3.9 Mio Swiss Francs**). Three of the undertakings concerned had filed leniency applications with the Competition Commission. The first leniency applicant was granted full immunity from sanctions. The decision of the Competition Commission is currently under appeal before the Federal Administrative Court.

- *Heiz-, Kühl- und Sanitäranlagen (decision of the Competition Commission of May 10, 2010)*: Horizontal agreements regarding the timing and extent of price increases between manufacturers of water management products for heating, cooling and sanitation systems[25]. One of the companies was sanctioned with **169,000 Swiss Francs**. The other enterprise involved the infringement filed a leniency application and was granted full immunity (i.e. a **bonus of 5.2 Mio Swiss Francs**).

- *SIX / Terminals mit Dynamic Currency Conversion (decision of the Competition Commission of November 19, 2010)*: Abuse of dominant position by SIX in the market of payment card terminals[26]. Six Group AG was sanctioned with **7 Mio Swiss Francs**. The decision of the Competition Commission is currently under appeal before the Federal Administrative Court.

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[22] LPC 2010/1, p. 65.

[23] See decision of May 10, 2010, available at http://www.weko.admin.ch/aktuell/00162/index.html?lang=de.

[24] LPC 2010/4, p. 717 et seqq.

[25] See decision of May 10, 2010, available at http://www.weko.admin.ch/aktuell/00162/index.html?lang=de.

[26] See decision of November 29, 2010, available at http://www.weko.admin.ch/aktuell/00162/index.html?lang=de.

17. Are fines imposed for procedural infringements (e.g. refusal to supply documents)? If so, who determines those fines and what methodology is used to calculate their amount?

Following Article 40 CartA members of cartels, undertakings with market power or undertakings taking part in concentrations as well as third parties are required to provide the competition authorities with all relevant information and to produce all necessary documents. According to Article 52 CartA an enterprise that fails to fulfil its obligation to provide information or produce documents or complies only partially therewith shall be required to pay an amount of at most 100,000 Swiss Francs. So far, only one undertaking has been sanctioned pursuant to Article 52 CartA. In that case, the Competition Commission held that the determination of such a sanction must follow the general principles of administrative law, the jurisprudence of the courts (especially of the Federal Administrative Court) with regard to fines imposed for competition infringements and the principles contained in the Ordinance on Sanctions which, according to the Competition Commission, shall apply *mutatis mutandis* to a sanction pursuant to Article 52 CartA (see LPC 2009/4, p. 464).

Further, according to Article 51 CartA, an enterprise that carries out a concentration without giving due notice thereof or fails to comply with a provisional ban on carrying out the concentration or with a condition attached to the authorisation or carries out a prohibited concentration or fails to implement a measure intended to re-establish effective competition shall be required to pay an amount of up to 1 Mio Swiss Francs. This fine is of administrative nature and must be calculated on the basis of the specific circumstances of the case. According to the case law of the Competition Commission, the calculation of the fine must take into account the following three criteria: (i) the importance of the undertaking that violates the duty to notify, (ii) the potential threat of the concentration to competition and (iii) the possibility that effective competition will be eliminated by the concentration[27].

II. NORMATIVE QUESTIONS

1. What body should determine the level of fines in any case (judicial/administrative)? If administrative, should the decision-maker be separate from the team that investigated the infringement? What opportunities should be given to the undertaking to make representations on the amount of the fine?

The body finally determining the level of fines should be a judicial body which must be independent from the investigating (administrative) body. In this respect, the current institutional situation in Switzerland is not adequate and may even violate the procedural rights of undertakings concerned. However, this problem may be solved with the intended revision of the CartA. The draft new CartA

[27] See LPC 1998/4, p. 618; LPC 2000/2, p. 261; LPC 2002/3, p. 533 et seqq.

provides with the creation of an independent competition authority which will lead the investigations and submit a draft decision to a newly created Federal Competition Court which will then issue the decision on sanctions.

It follows from the right to be heard which is implemented in Article 29(2) of the Swiss Federal Constitution that an undertaking must be given the opportunity to comment on the amount of the fine before a decision is taken.

2. To what extent should the methodology used/level of fines be determined by, or be subject to the approval of, the legislature or politically-accountable government ministers, or should the level of fines and methodology used be left to independent competition authorities or courts?

Considering the severity of the effect of fines for the undertakings involved, the legal basis for a fine for competition infringements including the main parameters for the calculation of the fine should be a formal law which has been approved by Parliament. However, the rules setting out the detailed methodology of the calculation may well be established in a so-called material law, i.e. an ordinance that has been established by the executive body (the Government, i.e. the competent Ministry) based on a legal authorisation laid out in a formal law.

3. What role should courts play in supervising the fining decisions of independent competition authorities? To what extent should they have regard to guidelines issued by competition authorities?

Courts should be able to fully review the fining decisions including, if necessary, re-determining fines in order to expedite proceedings. As long as the guidelines issued by the competition authorities are in line with general legal principles, the courts should respect the guidelines. However, the courts shall not be bound by such guidelines as these have only been issued by competition authorities and not according to an ordinary legislative procedure.

4. To what extent should the level of fines reflect the size of the undertaking concerned? If so, how should "size" be measured? If turnover is to be used, what measure of turnover is appropriate (relevant market/overall turnover; year of infringement/year of fining decision)?

The economic size of the undertaking concerned should serve as the basis for the level of fines. It seems that the turnover of an undertaking is the most appropriate means to measure this size. Further, the fine should be determined based on the turnover realised on the relevant market. Even if the effect of deterrence may be higher if one considered the overall turnover as the basis for the

calculation, it seems appropriate to take into account the turnover on the relevant market only, as the harmful effects of an infringement are usually limited to that market. The level of fines should depend on the turnover in the year of the finings decision as the proportionality of the fine may only be reached on the basis of the present size of the undertaking concerned.

5. How should the seriousness of an infringement be judged? To what extent should the anti-competitive intentions of the undertaking or its employees be relevant?

The seriousness of an infringement should rest on different factors, e.g. on the

- effect of the infringement (e.g. effect on price level on the relevant market and on neighbouring markets);
- duration of the infringement;
- the organisation/sophistication of the infringement.

The intention of the undertaking and its employees should also be taken into account. However, these intentions should lag behind the effect of the infringement.

6. To what extent should the actual effects of the infringement be relevant? Should the amount of the fine exceed the harm caused (or likely to have been caused) by it, in order to provide suitable deterrence bearing in mind a low likelihood of detection? If that is right, does it suggest that, other things being equal, fines should in general be higher in cartel cases (which are inherently secret) than in other types of case where detection is easier?

The effect of the infringement should largely be taken into account. As it is very difficult to measure the harm caused it seems almost impossible that the amount of a fine will ever match the harm caused. The potential secrecy of competition infringements should not be the reason for higher fines in cartel cases (especially if a leniency programme is in place which creates an incentive to "lift the secret").

7. Is it relevant that those involved in the infringement believed that it was justified on public interest grounds (e.g. to protect jobs) or because some government official(s) had, formally or informally, encouraged it?

Justifying competition infringements with public interest grounds is usually a pretext for preserving inefficient companies or industries. If e.g. jobs can only be protected by means of competition infringements, a company or an entire industry is probably simply not efficient enough and hence, in a free economy there would be no serious public interest in preserving that company/industry. Further, statements or encouragements by government officials cannot serve as a justification for an

infringement. This would undermine the position of the Competition Authorities and render it impossible for them to effectively protect competition.

8. How should the objective of deterring future infringements be reflected in fining policy?

The deterrent effect should result from the legal provisions governing the law and not so much from the fining policy of the Competition Authority/the Courts. The fining policy should rather take into account the individual circumstances of a case.

9. To what extent should the level of fines in competition cases be consistent with the level of fines imposed for other economic crimes/infringements (fraud/environmental law/consumer protection)?

The fining of undertakings and the corporate liability is not much developed in Switzerland. It is rather the question here whether fines for other economic crimes/infringement should be consistent with the level of fines in competition cases than the other way around. These fines are rather too low than the fines for competition infringements too high.

10. If competition fines are now high compared to fines for other economic crimes/infringements, is there any factor (such as the relative difficulty of detection) that might justify that difference, or is the difference not justifiable?

Competition fines are very high compared to fines for other infringements. In some cases the difference can be justified with the amount of people concerned by a competition infringement. However, if one considers the possible effects e.g. of infringements of environmental law and the low fines provided in the applicable provisions, the difference does not seem justifiable.

11. Is it proper to entirely dispense with fines for the enterprise that first discloses the existence of a covert conspiracy to the competition authority? To what extent should fines on an undertaking reflect its behaviour after the infringement, such as co-operation/non-co-operation with the investigation/introduction of compliance measures/disciplinary action against employees involved/payment of compensation to victims?

This approach has proven successful in Switzerland. Incentives linked to the cooperation of an undertaking are crucial for successful investigations of the Competition Authorities. With regard to compliance measures or disciplinary actions against employees, one should rather look at how such measures were applied before the infringement was discovered. It should not be possible for an

undertaking to buy itself free from a fine in compensating the victims. This would be contrary to the rule of law.

12. What rules should govern the imposition of fines for infringement by an undertaking on the owners or part-owners of that undertaking? How should those rules be applied when the ownership of the undertaking has changed between the date of infringement and the date when the fine is imposed?

In principle, the controlling company should be liable for the payment of competition fines by its subsidiary. If a company is jointly controlled by several other companies, these companies should be jointly and severally liable for the fine. Regarding a change of ownership, the fine should in principle be imposed to the company that exercised control over the undertaking but the fine would have to be calculated based on the turnover of the new owner (as one should consider the financial strength at the time of the imposition of the fine). There should be a subsidiary liability for the new owner (i.e. if the previous owner does not have sufficient assets to pay the fine or does not exist anymore etc.).

13. Are competition fines, and the procedures by which they are determined, consistent with international human rights standards, insofar as they apply to corporate bodies?

See answers above (B.10). In Switzerland, the lack of institutional separation between the investigation and the decision body has been criticised for violating Article 6 ECHR and the next revision of the Cartel Act should provide for a clear separation.