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Compatibility of Transactional Resolutions of Antitrust Proceedings with Due Process and Fundamental Rights & Online Exhaustion of IP Rights

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15.1 Introduction

Transactional resolutions in Switzerland are part of a dynamic field characterized by constant conflicts and compromises—a constant balancing act between authorities' possible actions in accordance with administrative law, benefits in the areas of fact-finding, and the efficient handling of actual or potential proceedings.

Although Swiss administrative law is familiar with the administrative contract as an instrument of cooperation between the state and undertakings, state action traditionally takes the form of rulings and decisions (*Verfügung*). From a constitutional point of view, the use of contractual and negotiation elements by the state is not unproblematic. Settlements between undertakings and the competition authority can be problematic with regard to the principles of legality, legal equality and the legal protection of third parties, as well as the inquisitorial principle (*Untersuchungsgrundsatz*). On the other hand, settlements can also lead to considerable benefits, such as more efficient and flexible resolution of cartel investigations with lower administrative effort and reduced appeals. If the fairness principle is respected during negotiations and not misguided by the mere threat of a higher fine if an undertaking refuses to settle, settlements can also lead to higher levels of acceptance by the undertakings involved.

On European Union level, the subject is addressed in Regulation 1/2003. First, commitment decisions were adopted on the basis of Article 9 in order to bring

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suspicious behavior to an end. More recently—in June 2008—settlement decisions were introduced for cartel cases.

In Switzerland, the Federal Act on Cartels and other Restraints of Competition (the "CartA") of 1995 established the institution of the amicable settlement as it continues to exist today.

The partial revision of the CartA in 2003[1] was hailed as a paradigm shift in Swiss competition law. In addition, by implementing direct sanctions for certain restraints of competition, it has also influenced transactional resolutions. Furthermore, the revision introduced new instruments, such as a leniency program and opposition proceedings (*Widerspruchsverfahren*), which promise to aid the enforceability of competition law.

Unlike in other jurisdictions, in Switzerland, the different forms of transactional resolutions in antitrust proceedings do have a legal basis in the CartA. Therefore, conflicts with due process and the fundamental rights of the parties are less severe—at least in principle.

15.2 Transactional Resolutions

15.2.1 Overview of Transactional Proceedings

The Swiss CartA provides for different cooperation procedures that enable the undertakings involved to escape or reduce sanctions or to avoid harmful decisions (such as the prohibition of a concentration). These options are available at various stages of an investigation:

1. During a *preliminary investigation* (agreement and abuse of dominance cases), the Secretariat of the Competition Commission (the "Secretariat") may propose or negotiate measures to eliminate or prevent restraints of competition (Article 26 CartA) (see Sect. 15.2.1.1 below).
2. Once a *formal investigation* (agreement and abuse of dominance cases) is initiated and the Secretariat considers that a restraint of competition is unlawful, it may propose or negotiate an *amicable settlement* concerning ways to eliminate the restraint with undertakings involved (see Sect. 15.2.1.2 below).
3. If an undertaking assists in the discovery and elimination of a restraint of competition, a sanction may be waived entirely or in part (leniency program, Article 49a CartA). Although it is recognized that the program is available in vertical and horizontal agreement cases, it is not yet clear whether or to what extent this is the case in abuse of dominance investigations (see Sect. 15.2.1.3 below).
4. Transactional elements also exist in the *merger control procedure*. Here, the Swiss Competition Commission (the "ComCo") may require the undertakings concerned to make binding proposals as to how effective competition may be

[1] In force per 1 April 2004.

restored. Such commitments are then subject to negotiations between competition authorities and the undertakings involved.

15.2.1.1 Commitments During the Preliminary Investigation (Article 26 CartA)

According to Article 26 para. 2 CartA, the Secretariat may propose measures to eliminate or prevent restraints of competition during its preliminary investigation. This offers the Secretariat an informal, fast, and cost-efficient opportunity to address and resolve an issue relevant to competition law without having to open a formal investigation.

Cooperation with competition authorities at such an early stage in proceedings can also prove beneficial for the undertakings involved. By exercising good negotiation tactics and adapting their behavior, a formal investigation, and thus the threat of sanctions, can be avoided.

The main focal point of negotiations between the Secretariat and the undertakings is the modification of future competition-related behavior. The parties may enter into an amicable agreement cementing the commitments made by the undertaking. The agreement can be concluded in orally or in writing and is *not subject to approval by ComCo.* Accordingly, the binding effect of such an agreement does not exceed the party's obligation to act in good faith.[2]

Due to the informal nature of the preliminary investigation, the parties do not have access to the file, which can be problematic if a party has to accept critical commitments and to bear the costs of the procedure.

15.2.1.2 Amicable Settlements During Formal Investigations (Article 29 CartA)

Compared to the commitments during the preliminary investigation (Article 26 CartA), amicable settlements during the main investigation (Article 29 CartA) are a more formal mode of amicable settlement only available at that particular stage. If the Secretariat considers a restraint of competition to be unlawful, it may propose an amicable settlement agreement concerning ways to eliminate the restraint to the undertakings involved. Any such agreement has to be made in writing and is *only valid and binding following formal approval by ComCo*.

The content of an amicable settlement can be any measure helping to eliminate a potential restraint of competition according to Articles 5 and 7 CartA (agreements and abuse of dominance cases). It can encompass prohibited actions, as well as actions still permitted and in compliance with competition law. The legal qualification and the admissibility or inadmissibility of a past action and the related sanctions are not negotiable. However, in practice, the undertakings negotiate maximum sanctions with the Secretariat. If ComCo exceeds the agreed maximum sanction in its approval decision, the settlement agreement is no longer binding.

[2] B. Zirlick and Ch. Tagmann, paragraph 11 to Article 29 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

Even after an undertaking and the Secretariat agree on a modification of conduct, ComCo still has the possibility and even the duty to make further inquiries, reject or accept the agreement, and impose a different sanction than agreed on with the Secretariat.

The violation of an amicable settlement is subject to the sanctions set out in Article 50 CartA.

Table 15.1 shows the amicable agreements concluded under Article 29 CartA between 1997 and 2013.

As Table 15.1 shows, the quantity, content, and importance of amicable settlements did not change following revision of the CartA in 2003. The introduction of direct sanctions, however, provided undertakings with an additional incentive to negotiate, as amicable settlements usually include a reduction of the fine (usually up to 20 %).

15.2.1.3 Leniency Program

The leniency program in Article 49a para. 2 CartA is designed to help the competition authorities uncover cartels. Cooperation between undertakings and competition authorities under the leniency program facilitates the fact-finding procedures and is thus more time- and cost-efficient.

The Ordinance of 12 March 2004 on Sanctions Imposed for Unlawful Restraints of Competition (Cartel Act Sanctions Ordinance, CASO) lays down the conditions and the procedure for obtaining complete or partial immunity from sanctions. ComCo grants an undertaking full immunity from sanctions if it provides information that leads to the launch of an investigation or evidence that enables the competition authority to establish a "hardcore" infringement of competition law (Article 8 CASO). The sanction is reduced by up to 50 % if the undertaking voluntarily cooperates in proceedings and if it terminates its participation in the infringement of competition no later than at the time at which it submits evidence. The reduction is based on the importance of the undertaking's contribution to the success of the proceedings (Article 12 para. 2 CASO). ComCo can reduce the amount of the sanction by up to 80 % if an undertaking voluntarily provides information or submits evidence on further unlawful infringements of competition (Article 12 para. 3 CASO).

Eligibility for leniency does not depend on whether the authority has already launched proceedings or not. In principle, there is no specific deadline for the participants to come forward with a leniency application. However, immunity from a sanction is no longer granted if the competition authority already possesses sufficient evidence to prove the infringement. Undertakings should therefore apply for leniency at an early stage of the proceedings. Further "pressure" on the undertakings results from the fact that only the first applicant is eligible for full immunity (Article 8 para. 1 CASO). Whether an undertaking is granted full or only partial immunity may be a matter of minutes.[3]

[3] In the case RPW 2009/3, pp. 196ff—"Electrical Installation Companies Bern," the difference between the first applicant and the second applicant was only 75 min.

Table 15.1 Amicable agreements concluded under Article 29 CartA (1997–2013)

Case	Reference	Behavior	
Swisscom—Centrex	RPW 1998/3, pp. 377 ff	Article 7 CartA	
Prix des quotidiens tessinois (Prices of the Newspapers in the Canton of Ticino)	RPW 2000/1, pp. 16 ff	Article 5 para. 3 CartA	
Recommandations de prix pour les boissons servies dans la restauration romande (Price Recommendations for Drinks Served in Restaurants in the Romandie	RPW 2000/1, pp. 25 ff	Article 5 para. 3 CartA	
CGE	RPW 2001/1, pp. 110 ff	Article 5 para. 3 CartA	
SUMRA/Distribution de montres (SUMRA/Distribution of Watches)	RPW 2001/3 pp. 510 ff	Article 5 para. 3 CartA	
Systeme de distribution—Citroën (Distribution System—Citroën)	RPW 2002/3, pp. 455 ff	Article 5 paras. 1 and 2 CartA	
Fahrschule Graubünden (Driving School Canton of Graubünden)	RPW 2003/3, pp. 271 ff	Article 5 para. 3 CartA	
Vertrieb von Tierarztmitteln (Distribution of Veterinary Products)	RPW 2004/4, pp. 1040 ff	Article 5 paras. 1 and 2 CartA	
CoopForte	RPW 2005/1, pp. 146 ff	Article 7 CartA	
Kreditkarten –Interchange Fee (Credit Cards—Interchange Fee)	RPW 2006/1, pp. 65 ff	Article 5 para. 3 CartA	
Revision 2003 (effective as of April 01, 2004) adopting direct sanctions			**Sanction imposed?**
Flughafen Zürich AG (Unique) (Zurich Airport—Unique)	RPW 2006/4, pp. 625 ff	Article 7 CartA	✓
Richtlinien VSW (Guidelines of VSW)	RPW 2007/2, pp. 190 ff	Article 7 CartA	✗
Arzneimittelinformationen (Health Care Information)	RPW 2008/3, pp. 385 ss	Article 7 CartA	✓
Sécateurs et cisailles (Garden Shears and Hedge Trimmers)	RPW 2009/2, pp. 143 ff	Article 5 para. 4 CartA	✓
Elektroinstallationsbetriebe Bern (Electrical Installation Companies Bern)	RPW 2009/3, pp. 196 ff	Article 5 para. 3 CartA	✓
VM Interchange Fees II (Precautionary Measures)	RPW 2010/3, pp. 473 ff	Article 5 para. 3 CartA	(✗)
Baubeschläge für Fenster und Türen (Building Hardware and Construction Fittings for Windows and Window Doors)	RPW 2010/4, pp. 717 ff	Article 5 para. 3 CartA	✓
Behinderung des Online-Handels (Restriction of the Online Trade)	RPW 2011/3, pp. 372 ff	Article 7 CartA	✗
Swatch Group (Swatch Group—Suspension of Delivery, Precautionary Measures)	RPW 2011/3, pp.400 ff	Article 7 CartA	(✗)
Komponenten für Heiz-, Kühl- und Sanitäranlagen (Components for Heating, Cooling and Sanitary Facilities)	RPW 2012/3, pp. 540 ff	Article 5 para. 3 CartA	✓
Recommandations Immobilier (Recommendations for Real Estate Agents)	RPW 2012/3, pp. 657 ff	Article 5 para. 3 CartA	✓
Vertrieb von Musik (Distribution of Music)	RPW 2012/4, pp. 820 ff	Article 5 para. 3 CartA	✓
Spedition (Freight Forwarders)	RPW 2013/2, pp. 142 ff	Article 5 para. 3 CartA	✓
Swatch Group Lieferstopp (Swatch Group—Suspension of Delivery)		Article 7 CartA	✓

15.2.2 Discretionary Power of Competition Authorities

According to Article 29 CartA, the Secretariat may propose an amicable settlement to the undertakings involved. It is also generally recognized that an undertaking can take the same initiative.[4] Finally, ComCo can instruct the Secretariat to work toward an amicable settlement.[5]

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 has to at least signal its willingness to enter into negotiations.[6] If several undertakings are involved in a restraint of competition, the Secretariat has to evaluate whether negotiations are to be conducted independently for each undertaking or in a combined way that encompasses all the circumstances of the infringement in question.[7]

Following negotiations, the Secretariat prepares a proposal for an amicable settlement and consults with the undertakings involved. Once the agreement is signed, the Secretariat prepares a motion to ComCo, which includes the settlement agreement, as well as a draft of the decision. This motion is first sent to the undertakings for comments; it is then forwarded to ComCo.[8]

It is worth noting that the Secretariat's discretionary powers become more limited as an investigation advances. Whereas the Secretariat has discretionary power as to whether or not to open a formal investigation, it can only exercise discretion in exceptional cases in advanced stages of proceedings when it comes to determining the fine. The Secretariat's power to conclude settlements without determining that a violation of competition law has occurred has in general been sharply reduced since the introduction of sanctions in the CartA.[9]

15.2.2.1 Practical Approach

According to the inquisitorial principle, the burden of proof lies with the competition authorities. The State is also required to respect the principle of legality in all

[4] S. Howald, Einvernehmliche Regelungen bei sanktionsbedrohten Verhaltensweisen im schweizerischen Kartellrecht, sic! 11/2012, p. 3; B. Zirlick and Ch. Tagmann, paragraph 70 to Article 29 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

[5] RPW 2007/2, p. 190 paras. 20 and 292—"Guidelines of the Association of Professional Swiss Advertising Companies VSW Regarding the Commissioning of Professional Agents."

[6] B. Zirlick and Ch. Tagmann, paragraph 73 to Article 29 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

[7] M. Tschudin, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, p. 1020.

[8] Article 30 CartA; M. Tschudin, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, p. 1020.

[9] P. Këllezi, Les accords amiables conclus avec les autorités de la concurrence et leurs implications pour les entreprises, in: F. Chabot (ed.), Développements récents en droit commercial III, CEDIDAC 2014, p. 101.

its actions. However, from a practical point of view, the competition authorities still have a broad margin of discretion to decide whether to open a formal investigation and whether to enter into an amicable agreement, as well as regarding what the content of a potential settlement agreement may be.

In the past, the competition authorities seemed to exceed the limits of their discretion in certain cases. In the "Garden Shears and Hedge Trimmers" case,[10] for instance, ComCo imposed a sanction upon an undertaking for a violation of Article 5 para. 4 CartA (vertical price fixing). In Swiss competition law, in order to be subject to sanction, the behavior of an undertaking has to *significantly restrict competition* in the relevant market. In the mentioned case, the market share of the undertakings involved was so small that the grounds for a sanction were doubtful. Despite this, the competition authorities concluded an amicable agreement with the parties and imposed a sanction.

At the stage of a *preliminary investigation*, some undertakings might be prepared to bear the costs of an investigation and to accept (unreasonable) commitments in order to avoid negative publicity and an expensive and time-consuming investigation.

15.2.3 Nature of the Legal Act Concluding, Approving, and Making Binding the Settlement

Swiss law prescribes a two-step process for amicable settlements. First, the agreement is concluded between the undertaking and the Secretariat (Article 29 para. 1 CartA). According to Article 29 para. 2, it then has to be formulated in writing and approved by ComCo.

The prevailing doctrine qualifies the amicable settlement between the undertaking and the Secretariat as a public law contract under the suspensive condition of approval by ComCo. 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 para. 1 CartA). This means that it can reject or accept the agreement, as well as suggest necessary changes.[11]

If ComCo approves the agreement, it usually includes the amicable settlement in the conclusion of its decision. The agreement is thus made binding, and a violation thereof is punishable according to Articles 50 and 54 CartA.[12] If ComCo rejects the Secretariat's proposal, the suspensive condition remains unfulfilled, and the undertaking is not bound to the agreement.

[10] RPW 2009/2, pp. 143 ss—"Garden Shears and Hedge Trimmers."

[11] B. Zirlick and Ch. Tagmann, paragraph 91 to Article 29 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

[12] RPW 2006/4, pp. 667 s.—"Unique Airport."

ComCo cannot amend an amicable settlement by itself, even if only details are concerned. Any changes are subject to the consent of the undertaking involved. If ComCO considers that an amendment is necessary, it has to refer back to the Secretariat, instructing it to work out a different agreement or to resume the investigation without an amicable settlement.[13]

15.2.3.1 Legal Consequences for the Parties

Since an amicable settlement has to pass through a two-step process, negotiations with the Secretariat must be distinguished from approval by 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 halt or adapt certain behavior or by defining an admissible scope of action *for the future,* it aims to restore lawful conditions. The parties can agree on what behavior is considered lawful and where the limits of what is legally permissible are exceeded.[14] As mentioned above, the legal qualification and admissibility or the inadmissibility of a past practice and the potential sanction connected to the practice cannot be part of the agreement.

In practice, however, the Secretariat requests a certain maximum sanction when submitting the agreement to ComCo for approval. The agreement on a specific maximum sanction between the Secretariat and the undertaking is usually situated in the preliminary remarks of an amicable agreement.

Because ComCo has, to date, always stayed within the limits of the sanction suggested by the Secretariat, the legal impact of the suggested maximum sanction has never been tested. The maximum sanction should not be underestimated, as it plays a very important role in negotiations with the Secretariat. This practice is problematic, as the CartA does not provide any legal basis for negotiations regarding the possible sanction. On the other hand, it is the result of the needs of the undertakings involved in cartel or abuse of dominance investigations. No undertaking would agree to an agreement that is missing one of the most important practical elements of a settlement—the amount of the sanction.

15.2.4 Fundamental and Procedural Rights of the Parties

15.2.4.1 Procedure

Competition law, as part of administrative law, is governed by the inquisitorial principle. The burden of proof for a restraint of competition basically lies with the State. In theory, proceedings leading to an amicable settlement should not be handled any differently in this regard, meaning that a sanction should only be

[13] B. Zirlick and Ch. Tagmann, paragraph 95 to Article 29 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

[14] S. Howald, Einvernehmliche Regelungen bei sanktionsbedrohten Verhaltensweisen im schweizerischen Kartellrecht, sic! 11/2012, p. 4.

imposed if the evidence gathered would allow the authorities to prove that an undertaking has engaged in unlawful behavior. In practice, however, standards (not the degree of proof but the amount of evidence gathered) may be lower in cases involving amicable settlement.[15]

In the field of competition law, the Federal Administrative Court previously ruled that a court may not impose excessively high requirements as to the credibility of evidence (degree of conviction). Accordingly, preponderant probability is sufficient and full proof is not necessary.[16] However, the reasoning supporting this opinion is hardly convincing, and the practice is to be considered problematic from a constitutional point of view. A very recent decision has made clear that even in cases where leniency applications and amicable settlements are involved, ComCo has to provide full evidence. Namely, the Federal Administrative Court has now ruled that several factors, but in particular the presumption of innocence, speak against a lowering of the standard of proof required. Because the constitutional principles of criminal law apply to the sanction pursuant to Article 49a CartA, the authorities must fully prove the infringement of competition law and may not base a sanction on statements made in a leniency application alone.[17]

15.2.4.2 Considerations When Entering into an Amicable Settlement or Making Use of the Leniency Program

The decision to enter into an amicable settlement or make use of the leniency program depends on the particular circumstances of the case at hand. Even if an undertaking believes that it has not violated competition law, it may still be tempted or even induced by the authorities to make use of these institutions.

Making use of a transactional resolution can prove very beneficial: first and foremost, the reduction in the amount of the sanction can be substantial. Participation in the leniency program can lead to full immunity from sanctions (Article 8 CASO), and entering into an amicable settlement is considered cooperative behavior by the authorities and can lead to a reduction of up to 40 %.[18] In ComCo's decisions so far, there have even been cases where the fine was waived in its entirety for proportionality reasons. Where a sanction was imposed, it was reduced by 15–25 % if a settlement agreement was entered into at the very beginning of proceedings and by up to 10 % if it was concluded relatively late in the process, namely after the Secretariat had presented its motion to the parties. In the preliminary stages of investigation, a modification of conduct on the relevant market may convince the authority not to launch a formal investigation.

[15] B. Zirlick and Ch. Tagmann, paragraph 49 to Article 29 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

[16] Judgment of the Federal Administrative Court of 12 February 2009, BVGE 2009/35, cpt 7.4.

[17] Judgment of the Federal Administrative Court of 23 September 2014, BVGE B-8430/2010, pts 5.4.26 ff; Decision of the Federal Administrative Court of 23 September 2014, BVGE B-8399/2010, pts 4.4.26 ff.

[18] Judgment of the Federal Administrative Court of 27 April 2010, B-2977–2007, pt 8.3.6.

In general, it can be said that cooperation is advisable when the facts are relatively clear and the probability of a fine is high. Also, where several undertakings are involved in a specific investigation, they may be more willing to settle or cooperate. Another incentive to settle lies in the fact that ComCo's decisions following settlements contain less reasoning and thus less detail, which can reduce the likelihood of follow-on civil claims. This is particularly true of settlements concluded during the preliminary investigation (Article 26 CartA). With a view to possible civil prosecution, particular attention should thus be paid to the wording of the settlement concluded with the Secretariat.[19]

On the other hand, if fact-finding is difficult and most of the legal questions remain inconclusive, the undertaking may be better off not making concessions in the form of an amicable settlement. It must be kept in mind, however, that where an undertaking rejects entering into settlement negotiations, the Secretariat is more likely to resort to more severe measures for fact-finding if the circumstances indicate that the undertaking could be involved in a restraint of competition.

15.2.4.3 Right Against Self-incrimination and Presumption of Innocence

As indicated above, competition law proceedings are governed by the inquisitorial principle, and the parties are under an extended duty to provide information. However, the duty to cooperate is limited by the right to refuse to testify as laid down in Article 16 of the Federal Act on Administrative Procedure (the "APA"), in connection with Article 42 of the Federal Act on Federal Civil Procedure. Namely, testimony can be refused if the truthful answer to a question asked could lead to criminal prosecution, to severe damage to the honour or to direct financial damages for the witness or persons close to him or her.

According to the heavily criticized practice of ComCo, when an undertaking involved in a restraint of competition intends to make use of the leniency program, it must make a *statement of guilt and specify in what form it has violated the Cartel Act (i.e. it has to provide a legal qualification of its behaviour)*. Entering into an amicable settlement, on the other hand, is not necessarily considered an admission of guilt regarding the alleged restraint of competition.[20] However, the competition authority does not seem to have developed a clear practice thus far.

The judgments of the Federal Administrative Court also vary. In a 2007 decision, the Federal Administrative Court stated that consent to a settlement and

[19] P. Këllezi, Les accords amiables conclus avec les autorités de la concurrence et leurs implications pour les entreprises, in: F. Chabot (ed.), Développements récents en droit commercial III, CEDIDAC 2014, pp. 100, 107.

[20] The legal qualification can also be influenced by the content of an amicable agreement: where an agreement specifically prohibits a certain type of conduct for the future, it is more likely that the court will assume an admission of guilt. On the other hand, when an agreement merely about future conduct in general is concluded, this is less likely to be considered as admission of guilt. See M. Tschudin, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, pp. 1023 ff.

acceptance of a sanction could hardly be interpreted differently than an admission of guilt as to a restraint of competition, even if the undertaking had expressly rejected making such an admission in its correspondence and in the text of its agreement with the Secretariat.[21] In contrast, in a very recent case, the Federal Administrative Court did not find that cooperating with the competition authorities within the framework of a leniency application and subsequently appealing the decision before the judicial authorities constituted contradictory behavior. The court stated that the willingness of a party to cooperate with the authorities does not constitute an admission of guilt as such and that submitting a leniency application has no effect on a party's procedural rights.[22]

The presumption of innocence comprises the right of everyone to be presumed innocent until proven guilty. Applied to amicable settlement proceedings, this means that an undertaking can only be sanctioned if the evidence against it would allow a full conviction. However, in amicable settlement proceedings where ComCo expects that the undertakings involved will not appeal the agreement, the authority may be tempted to impose a sanction even if it is unclear whether the facts would eventually allow for a conviction.

15.2.4.4 Right To Be Heard and Access to the File

As a prerequisite to exercising its right to be heard, a party has to be granted access to the relevant files concerning its own case. According to established case law, competition law is subject to heightened requirements regarding the principle of access to the case file.[23]

Unclear is, however, at exactly what stage of the investigation the parties are to be granted access to the file. Even though Article 26 para. 3 CartA states that the parties do not have the right to access the file during the preliminary investigation, the competition authorities may still grant partial access if required by the circumstances of the case.[24] From the time the formal investigation is launched, the procedure is governed by the APA, which grants 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 while negotiating an amicable settlement. Especially in cases involving leniency applications, access to the file is usually restricted until the settlement agreement is concluded or until the Secretariat sends its draft motion to ComCo to the parties. Experience has shown that the Secretariat tends to request that parties implicated in proceedings first express their willingness to enter into settlement negotiations before they are granted access to the file. This request is

[21] Judgment of the Federal Administrative Court of 3 October 2007, B-2157/2006, pt 3.3.2.

[22] Judgment of the Federal Administrative Court of 23 September 2014, B-8404/2010, pt 4.9; judgment of the Federal Administrative Court of 23 September 2014,B-8430/2010, consideration 2.8.

[23] S. Bigler, paragraph 63 to Article 39 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010; RPW 2006/2, pp. 347 ff.

[24] B. Zirlick and Ch. Tagmann, paragraph 99 to Article 26 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

combined with the latent threat that any sanction will only be reduced by a smaller amount should the parties decide to enter into settlement negotiations at a later point in time. This practice is problematic from the point of view of the parties' procedural rights and should be abandoned in the future.

15.2.4.5 Right to Equal Treatment

The principle of equality before the law (Article 8 para. 1 and Article 29 para. 1 of the Federal Constitution) stipulates the right of every person to equal treatment in comparable circumstances and differing treatment in different circumstances. This principle fully applies to undertakings in competition law proceedings.[25]

Tensions may thus arise when two undertakings in very similar positions are treated differently. This is best shown through the example of the leniency program: Article 8 CASO stipulates the requirements for an undertaking to be granted complete immunity from a sanction. According to paragraph 4a, full immunity from a sanction can only granted if no other undertaking has already fulfilled the requirements for complete immunity. This means that no more than one applicant can ever benefit from full immunity—even if the second application is made just five minutes later.[26]

15.2.4.6 Right to an Impartial Judge

According to Article 30 para. 1 of the Federal Constitution and Article 6 para. 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 "PubliGroupe" decision,[27] the Swiss Supreme Court ruled that sanctions under Article 49a CartA are criminal law sanctions in the sense of the ECHR. As a consequence, the parties must be granted all of the relevant minimal procedural safeguards, including access to an impartial judge.[28]

ComCo as an administrative commission does not meet the requirements set out in Article 6 ECHR. However, referring to the European Court of Human Rights' decision in the "Menarini" case, the Swiss Supreme Court has ruled that it is sufficient to grant access to a court in conformity with the guarantees of the ECHR in the appeals procedure. This decision is less than satisfactory for undertakings involved in sanctions procedures, as the latest rulings of the Federal

[25] S. Bigler, paragraph 21 to pre Articles 39–44 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

[26] RPW 2009/3, pp. 196 ff—"Electrical Installation Companies Bern." Several undertakings were involved in this case. In order to respect the principle of equal treatment, the competition authorities have to inform all of the parties involved about the leniency program.

[27] Judgment of the Swiss Supreme Court of 29 June 2012, BGE 139 I 72. This decision lead to a controversial discussion in the doctrine and was mostly criticized (see G. Brei, Kartellrechtsverfahren nach PubliGroupe – offene Fragen und praktische Probleme, SJZ 2014, pp. 177 ff).

[28] Judgment of the Swiss Supreme Court of 29 June 2012, BGE 139 I 72.

Administrative Court, which is the normal appeal instance in the field of competition law, show that it is rather reluctant to overturn ComCo's decisions.

15.2.4.7 Right to Trial

In some cases, the Secretariat asks undertakings involved in amicable settlement proceedings to waive their right to appeal under certain conditions or at least to declare their intention not to appeal Comco's decision.[29]

It is widely recognized that a waiver of the right to appeal is not legally binding. Still, the exact effects of such a waiver are controversial in the legal literature.[30] One condition of initiating an appeal is a legitimate interest in bringing proceedings. It is questionable whether a legitimate interest to appeal is given if an undertaking has entered into a settlement agreement and ComCo has respected the defined limits of such agreement in its decision. However, in very recent cases before the Federal Administrative Court, the court accepted to hear the appeals of companies that applied for leniency and entered into settlements with the competition authorities without questioning their interest to appeal. The court also noted that no inconsistent behavior was evident if a party cooperated with the authorities but subsequently appeals their decision.[31]

15.3 Merger Control

In Swiss merger control procedures, the thresholds for intervention by competition authorities are rather high. Prohibitions of concentrations are very rare; there has only been one case in Switzerland so far. However, in many cases, undertakings have offered to make commitments (obligations or conditions) similar to the commitments made during negotiation of an amicable settlement. By doing so, an undertaking risks offering more than the authorities could actually oblige it to do.

In an obiter dictum, the Swiss Supreme Court ruled that conditions and obligations cannot be part of an agreement between the parties. Instead, they have to be part of a formal decision by ComCo.[32] In practice, however, conditions and obligations are negotiated between the parties and the Secretariat.

[29] These conditions usually are that the ComCo approves the agreement and stays within the suggested sanctioning framework (M. Tschudin, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, pp. 1025 s.; S. Howald, Einvernehmliche Regelungen bei sanktionsbedrohten Verhaltensweisen im schweizerischen Kartellrecht, sic! 11/2012, p. 5).

[30] M. Tschudin, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, pp. 1025 s. with further references; P. Këllezi, Les accords amiables conclus avec les autorités de la concurrence et leurs implications pour les entreprises, in: F. Chabot (ed.), Développements récents en droit commercial III, CEDIDAC 2014, p. 117.

[31] Decision of the Federal Administrative Court of 23 September 2014, B-8404/2010, pt 4.9.

[32] RPW 2007/2, p. 329 para. 9—"Swissgrid."