

Switzerland

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REGULATION

1. Please give a brief overview of the legislation that allows a leniency programme, the authority that administers it and details of any published guidance.

A leniency programme is available. Conditions and the procedure for the leniency programme are regulated by the:

- Federal Act on Cartels and Other Restraints of Competition 1995 (Competition Act).
- Ordinance regarding Sanctions for Unlawful Restraints of Competition 2004 (Ordinance on Sanctions).
- Guidance Notice on the Ordinance on Sanctions 2004.
- Leniency Application Form and explanatory note, available on the website of the Federal Competition Commission (FCC) (see www.weko.admin.ch).

The FCC has primary responsibility for enforcing competition rules. The FCC's Secretariat (Secretariat) conducts investigations and administers the leniency programme. Final decisions regarding infringements and administrative and criminal fines are the FCC's responsibility (see box, *The regulatory authority*).

The FCC can conduct two types of investigations:

- **Preliminary investigation.** This establishes whether an agreement is capable of affecting competition.
- **Regular investigation.** This establishes whether an agreement actually affects competition.

2. What infringements of competition law are covered by the leniency programme?

The leniency programme applies to restrictive agreements that are prohibited (and therefore subject to fines) because they contain hard-core clauses, which eliminate competition. Restrictive agreements are also prohibited if they contain hard-core clauses, which appreciably restrict competition, but whether sanctions can be imposed on these types of clauses is uncertain.

The leniency programme is available in connection with horizontal agreements that include any of the following hard-core clauses:

- Direct or indirect price-fixing (such as agreements on discounts or tariffs fixed by a professional association, including non-binding recommended prices if they are followed by the association's members).
- Limits on the production, sale or purchase of goods or services.
- Geographic and customer market sharing.

The leniency programme is also available in connection with vertical agreements that include any of the following hard-core clauses:

- Resale price-fixing.
- Minimum resale price imposition.
- Allocation of exclusive commercial territories to selected distributors within a distribution network that excludes even passive sales.

3. Please provide examples of notable recent cases in which the leniency programme has been applied.

The leniency programme has only been available since 1 April 2004. There are no reported cases or information available in relation to the frequency of leniency applications and grants.

AVAILABILITY OF LENIENCY

4. Is full immunity from civil fines available and what conditions must be met for immunity to be granted?

An undertaking that participates in horizontal or vertical agreements, which include hard-core clauses that will eliminate competition, is fined up to 10% of its turnover in Switzerland in the previous three business years (*Competition Act*). (The assessment criteria for imposing fines are set out in the Ordinance on Sanctions.) However, the fine may be fully or partially exempted if the undertaking co-operates with the FCC.

Full immunity from fines is available for the first undertaking that:

- Reports its involvement in a qualified hard-core cartel (see *Question 2*).

- Delivers information enabling the Secretariat to start a regular investigation (*see Question 1*). Information enabling a preliminary investigation is not sufficient for full immunity, but can be considered for leniency (*see Question 5*).
- Meets the following conditions:
 - it must not have coerced any other undertakings to participate in the cartel activity;
 - it must not have instigated the cartel activity;
 - it must not have been the main party in the cartel activity;
 - it must spontaneously deliver all available information and evidence relating to the infringement under examination. In particular, the following are considered to be available to undertakings for these purposes:
 - employees and corporate bodies (such as a board of directors or auditors) to give statements and appear at possible hearings;
 - documents and other evidence to be found in office premises and employees' homes.
 - it must maintain complete, continuous and prompt co-operation with the Secretariat throughout the proceedings;
 - it must cease participation in the prohibited activity either at the time of disclosure or when directed by the Secretariat (for example, so as not to jeopardise the progress of an investigation of other participants to the cartel).

Full immunity is not available if the Secretariat already has sufficient information to begin a preliminary or regular investigation. However, if the Secretariat already has sufficient information, an undertaking can still qualify for full immunity, at any stage in the proceedings, by submitting evidence enabling the Secretariat to establish the actual existence of the infringement during a regular investigation provided that:

- The information that the Secretariat has for a preliminary investigation was not provided by another undertaking (that is, the Secretariat has initiated an investigation of its own accord).
- No other undertaking has already fulfilled the conditions for full immunity.
- The Secretariat does not yet have sufficient evidence to prove the infringement.
- Other conditions for immunity are met (*see above*).

Full immunity is not available where an administrative fine has been imposed on the undertaking concerned for failure to comply with an FCC decision, for example:

- Failure to comply with an FCC injunction or decision (including an amicable settlement approved by the FCC).

- Failure to provide requested information to the FCC.

5. Is there a sliding scale of available leniency from civil fines (for example, if full immunity is not available, are decreasing levels of leniency available for subsequent applicants)?

A reduction in fines by up to 50% (leniency) is available, at any time in the procedure, to an undertaking that does not qualify for full exemption (for example, it is not the first to qualify) and can be granted to several undertakings involved in the same activity.

To qualify, cartel participants must:

- Co-operate spontaneously with an investigation. This obligation extends beyond the general obligation to co-operate in administrative proceedings and an applicant should:
 - provide evidence that would otherwise remain undiscovered;
 - help to reduce the costs of investigation for the Secretariat.
- End their involvement in the prohibited agreement at the time evidence is provided.

The amount of the reduction depends on:

- The extent to which the undertaking contributes to the success of an investigation.
- The timing of co-operation.

If the evidence submitted by the applicant for leniency reveals that the infringement lasted for an additional period to that which was already known by the FCC, which would result in an increase of the fine, the FCC will not take this additional period into account when calculating fines. (If the additional period was included, applicants would be less likely to co-operate in case their co-operation might lead to an even larger fine.)

A reduction in fines by up to 80% is also available to applicants qualifying for leniency if they disclose a second (still hidden) hard-core cartel (*see Question 13*).

As for full immunity, leniency is not available where an administrative fine has been imposed for failure to comply with an FCC decision (*see Question 4*).

6. Is immunity or leniency for civil fines available to individuals (for example, managers and employees of an undertaking that has been granted immunity or leniency)? If so, what conditions apply?

Individuals are not subject to administrative sanctions for infringement of the Competition Act. Therefore, the Ordinance on Sanctions and the leniency programme do not apply to individuals, only undertakings.

7. Is leniency or immunity available for companies and/or individuals in relation to criminal prosecution? If so, please state:

- **The circumstances in which leniency or immunity from criminal prosecution is available.**
- **Whether criminal proceedings can be brought against individuals in an undertaking that has been granted leniency or immunity (whether from civil fines or criminal prosecution).**
- **How employees' interests can be protected when a company applies for leniency.**

■ **Circumstances.** Infringement of the prohibition of cartels is not a criminal offence (either for an undertaking or an individual) and does not result in criminal sanctions. Therefore, the leniency programme is only available for administrative sanctions.

■ **Proceedings against individuals.** Individuals (including employees) can be criminally liable, and fined up to CHF100,000 (about US\$80,006), if they do not respect an FCC final decision (including an amicable settlement approved by the FCC). Although the leniency programme does not apply to criminal prosecution (*see above, Circumstances*), the offender's behaviour throughout criminal proceedings can be considered when determining the amount of the fine as a general principle of criminal administrative procedure.

■ **Employees' interests.** Employees are not subject to the leniency procedure and are not protected by it (*see Question 6*). However, an offender's behaviour is considered when assessing the level of a criminal fine (*see above, Proceedings against individuals*).

APPLICATION PROCEEDINGS

8. When should an application for leniency be made?

An application should be made at an early stage, as full exemption from sanctions can be only granted to the first undertaking that comes forward with information or evidence (*see Question 4*).

An applicant for a partial reduction in fines must end its involvement in a prohibited agreement at the time evidence is provided. The timing of co-operation is one of the factors determining the amount of reduction. The application will be viewed less favourably if the evidence was already provided by other undertakings.

In addition, applicants disclosing a second, still hidden cartel can qualify for a reduction of up to 80% (*see Question 13*).

(*See also Question 5.*)

9. Please set out how an application for leniency must be made. In particular:

- **To which authority should an application be submitted?**
- **Who should make the application (for example, the company itself, its legal adviser or an individual employee)?**
- **Is it possible to obtain informal guidance on a confidential basis before submitting an application, to determine whether an undertaking will qualify for full immunity or leniency?**
- **What form of application is used?**
- **Can a marker be obtained to secure a certain level of leniency until all conditions can be met?**
- **What type of information or evidence are applicants expected to provide?**
- **Are oral statements accepted?**

■ **Relevant authority.** An application for leniency must be submitted to the Secretariat.

■ **Applicant.** An application can only be filed by a single undertaking and/or its representative (not jointly by two or more undertakings).

■ **Informal guidance.** The Secretariat can be contacted on an informal basis before the application.

■ **Form of application.** An application for full immunity or leniency must be submitted either:

- on a Leniency Application Form (in German, French or Italian), which must be:
 - filed in triplicate;
 - filed by hand, post or fax (but not by e-mail or by phone);
 - signed and dated;
- orally (*see below, Oral statements*).

It is advisable to send the application form by fax, hand deliver it or provide it orally. This is because it can be difficult for the Secretariat to determine the exact order it has received applications which were sent by post.

■ **Markers.** The Secretariat will conduct a full review of leniency applications in the chronological order that it receives them (provided that they are valid) to determine precedence for full immunity. The Secretariat will confirm receipt of the notification and inform the applicant of the time of receipt. The Secretariat only reviews leniency applications received later once it has reached a decision on earlier applications.

■ **Information/evidence.** An application must contain the following information:

- a description of the applicant;
- the type of restraint of competition and the aims of the agreement;
- an identification of the undertakings involved, including:
 - names;
 - legal forms;
 - addresses;
 - seats or places of business;
 - names of the persons acting for these undertakings;
- the affected markets;
- all evidence available that supports the application, for example:
 - contracts, e-mails and other documents;
 - names of witnesses;
 - information relating to meetings, telephone conversations and other contact and communications;
 - an indication of relevant existing pieces of evidence which the applicant is aware of but not able to provide.

The Secretariat can, at any time, request additional relevant documents and information.

- **Oral statements.** An application for full immunity or leniency can also be submitted orally. However, the application cannot be submitted orally by phone; it must be given in person at interview. The Secretariat official then enters the oral application in the records. Oral statements protect the applicant from any obligation to produce documents supplied to the Secretariat to foreign authorities (see *Question 15*).

10. Please set out the procedure and timetable.

The Secretariat immediately confirms receipt of the application, including time and date. The Secretariat reviews leniency applications in the chronological order received, to determine precedence for full immunity (see *Question 9, Markers*).

When an application for full immunity is received, the Secretariat:

- Assesses the case and indicates whether (and within which time limit) additional information must be provided by the applicant. Where the application is anonymous, the Secretariat provides a deadline within which the applicant must disclose its identity (see *Question 14*).

- Reaches agreement with a member of the FCC's presiding body as to whether the required conditions have been fulfilled. The Secretariat then informs the applicant of this assessment through a statement of assurance. This assures the applicant that it will receive immunity at an early stage of the proceedings. There is no time limit within which the presiding body must be consulted or the applicant notified through a statement of assurance.

If the Secretariat decides that the applicant qualifies for full immunity, the FCC (which has sole authority to impose fines) is bound by the statement of assurance. This means that the FCC can only deviate from this assurance when it issues its final decision (the final stage of the proceedings) if it later becomes aware of additional circumstances that justify deviation (for example, the FCC discovers that the applicant instigated, or was the principal party in the infringement, or the applicant does not co-operate fully).

If the Secretariat decides that the applicant does not qualify for full immunity as it was not the first to apply, the applicant will be informed whether a reduction in fines is available only when notified of the FCC's final decision. There is no time limit within which a final decision must be given.

11. In what circumstances can leniency be withdrawn and at what stage in the proceedings? What implications does the withdrawal of leniency from one company have for other applicants (for example, could full immunity become available again)?

The Competition Act does not expressly regulate the possibility of the FCC withdrawing immunity or leniency after it has been granted in a final decision. Nevertheless, general principles of administrative procedure usually allow administrative authorities to withdraw or amend final decisions (including final decisions in relation to full immunity or leniency) under certain circumstances, for example:

- If additional circumstances are discovered that justify withdrawal or amendment.
- A final decision is unjustified.
- A duty of the undertaking concerned (such as the duty to co-operate fully) is violated.

SCOPE OF PROTECTION

12. What is the scope of leniency protection after it has been granted (for example, does it apply only in so far as the infringing activities are revealed in information provided by the applicant to the competition authority, or also where further evidence of infringement is collected by the authority)?

Leniency protection only applies to the particular infringement specified in an application.

If, during the investigation for that infringement, the Secretariat discovers a second infringement, this cannot be protected under the original application. A separate application must be submitted.

13. Does the competition authority offer any further reduction in fines for activities in one market if an undertaking is the first to disclose restrictive agreements and practices in another market (leniency plus)?

The fine for a particular infringement can be reduced by up to 80% if an undertaking discloses information or evidence relating to a second, still hidden, hard-core cartel. This reduction is without prejudice to any possible full exemption or partial reduction of fines for the newly-disclosed cartel.

The Ordinance on Sanctions does not specify whether the second cartel must relate to another market or whether it can relate to another cartel activity in the same market.

CONFIDENTIALITY AND DISCLOSURE

14. In relation to confidentiality:

- **Is the identity of a leniency applicant disclosed during an investigation or in a final decision?**
 - **Is information provided by a leniency applicant passed on to other undertakings under investigation?**
 - **Can a leniency applicant request confidentiality of its identity or information provided?**
-
- **Identity disclosure.** The identity of the parties to an investigation (including the applicant) is published when a regular investigation begins and the fact that the applicant has made a leniency application is also made clear in the final decision. (However, there are no examples of this as there has not, as yet, been a completed final decision in Switzerland (see *Question 3*).)
 - **Information disclosure.** Generally, undertakings under investigation can consult documents and files (and have access to the information provided by a leniency applicant), if a regular investigation has been started (see *Question 1*). However, the FCC is bound by professional secrecy and cannot reveal business secrets. As a result, access to information that may reveal business secrets must be refused to other parties to the investigation. In addition, the FCC must not provide evidence to undertakings that are not parties to the investigation.
 - **Confidentiality requests.** An applicant can file an initial anonymous application for full immunity. This must satisfy certain requirements (for example, information provided must allow a proper assessment by the Secretariat). The Secretariat then sets a deadline within which the applicant must disclose its identity and assesses whether the applicant would qualify for full immunity (before this deadline expires) so that the applicant can decide whether to submit a formal application.

THE REGULATORY AUTHORITY

Federal Competition Commission (FCC)

Head. Professor Walter Stoffel (President of the FCC); Rafael Corazza (Director of the Secretariat)

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Responsibilities. The FCC has primary responsibility for enforcing competition rules. The FCC's Secretariat is responsible for conducting investigations and administering the leniency programme.

Person/department to apply to. Applications must be submitted to the Secretariat. Initial contact can be made by telephone and prospective applications can be discussed on an anonymous basis. However, the Secretariat does not consider applications made by telephone as having been validly filed.

Procedure for obtaining application documents. The Leniency Application Form is available on the FCC's website (see *above*).

As an applicant must disclose its identity if it decides to submit a formal application, it cannot request confidentiality of its identity at that stage. However, it can request that information that may reveal certain business secrets be protected by the official confidentiality obligation (see *above*, *Information disclosure*).

15. In relation to statements made in support of a leniency application:

- **Can information submitted in your jurisdiction be made subject to discovery orders in the domestic courts?**
 - **Can information submitted in your jurisdiction be made subject to discovery orders in foreign courts?**
 - **Can information submitted in foreign jurisdictions be made subject to discovery orders in the domestic courts?**
-
- **Domestic submissions and domestic discovery.** Discovery orders are not available under Swiss (civil and administrative) procedural law. However, the FCC or the civil court can order parties to leniency proceedings to produce any document at their disposal, including a statement made in support of leniency in a foreign jurisdiction (see *below*, *Foreign submissions and domestic discovery*).

- **Domestic submissions and foreign discovery.** Generally, documents can be obtained by foreign judicial authorities under the HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 (Hague Evidence Convention).

However, at the time Switzerland ratified the Hague Evidence Convention, it made a reservation, declaring that letters of request to obtain pre-trial discovery of documents will not be executed if:

- the request has no direct and necessary link with the proceedings in question;
- the request requires a person to indicate what documents relating to the case are or were in his possession, keeping or at his disposal;
- the request requires a person to produce documents that are stated to be likely to be in his possession, which are not specifically mentioned in the request;
- the lawful interests of the person from whom evidence is requested may be compromised.

A lawyer who attempts to take a deposition or serve a process in Switzerland by an unauthorised method is subject to arrest on a criminal charge (*Swiss Criminal Code 271*).

- **Foreign submissions and domestic discovery.** The FCC can order parties to produce any document at their disposal

(including a statement in support of leniency in a foreign jurisdiction) (see above, *Domestic submissions and domestic discovery*).

INTER-AGENCY CO-OPERATION

16. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?

No formal co-operation agreements have yet been entered into with regulatory authorities from other jurisdictions. However, co-operation takes place on an informal basis when all the parties involved consent.

PROPOSALS FOR REFORM

17. Please summarise any proposals for reform.

Following the latest amendments to the Competition Act setting out the leniency programme (in force since 1 April 2004), there are no new proposals for reform.

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