

Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

Competition Commission, Switzerland

The following template is submitted by the Competition Commission (“COMCO”), Switzerland pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

I. Introduction

The COMCO (www.weko.admin.ch) is an independent federal authority in charge of the enforcement of competition law, namely the Cartel Act ([Federal Act on Cartels and other Restraints of Competition](#), CartA). Swiss competition law enforcement is based on three pillars: anticompetitive agreements, abuse of dominant positions and merger control.

The Swiss Competition authorities consist of two bodies. The Secretariat of the Competition Commission (“Secretariat”) on the one hand leads Investigations and is in charge of general operations. It comprises about 70 full-time staff members. The Competition Commission on the other hand adopts the decisions. It is composed of 13 part-time members who are elected by the Federal Council.

Besides their role as an investigator and decision maker, the competitions authorities fulfill an advisory role and can issue recommendations to public authorities.

II. Laws, Regulations, and Policies relevant for the implementation of the CAP

For each CAP Principle below, please explain how your competition law Investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.

Please update your Template reflecting significant changes as they relate to the CAP, as needed.

b) Non-Discrimination

Each Participant will ensure that its Investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

The Swiss Cartel Act applies to private and public undertakings participating in cartels or other agreements affecting competition, which exercise market power or which participate in concentrations of undertakings. This applies to all undertakings regardless of their legal or organizational form, but also regardless of their nationality. The Cartel Act targets practices that have an effect in Switzerland, regardless of the origin of the practice or nationality of the undertaking. (Art. 2 of the Cartel Act)

Switzerland is party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.



c) Transparency and Predictability

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

- i. The Swiss Cartel Act is Federal Law and is published in the Federal Gazette, the Official Compilation of Federal Legislation and the Classified Compilation of Federal Legislation. The [website](#) of the COMCO links to all the applicable legislation.
- ii. The main legislation governing the procedural rules is the Administrative Procedure Act ([Federal Act on Administrative Procedure](#), APA), the [Federal Act on Federal Civil Procedure](#), (FCPA) and the [Federal Law on Administrative Criminal Law](#) (ACLA) (German/French/Italian version only).
- iii. The Federal Laws are published in print and in electronic format in the above-mentioned sources (cf. i.) and the guiding notes are available on the [website of the COMCO and the Federal Gazette](#).
- iv. The COMCO follows applicable procedural rules in Investigations and enforcement proceedings. Failure to do so can lead to an exclusion of evidence or even an annulment of the COMCO decision.
- v. The COMCO has issued a series of guiding documents on the protection of confidential information, the handling of deadlines and time periods in procedures and the use of investigative instruments. Furthermore, the COMCO issued a notice for Swiss undertakings on how to handle requests for information by the European Commission. The COMCO also publishes its reports, recommendations and decisions in the quarterly publication Law and Policy on Competition (LPC) available on the [website](#) (only in German/French/Italian). The Freedom of Information Act ([Federal Act on Freedom of Information in the Administration](#), FoIA) ensures public access to official documents (closed cases). Two more guiding documents will be published soon, one describing the procedure before the COMCO, the other explaining the entire Investigation in simple terms to a non-specialist public.

d) Investigative Process

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g.,*

forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.

- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

i. The COMCO informs any Person subject of an Investigation as soon as practical and legally permissible of that Investigation.

If the COMCO decides to open an Investigation or an administrative procedure, undertakings are informed in writing without delay. This writing specifies the suspected anticompetitive behavior and the legal basis of the Investigation. If the COMCO decides to open an Investigation with a dawn raid, the same information is given orally to the undertaking – In addition to the writing – as soon as the raid starts.

In merger cases, the parties are in contact with the case team from the start of the notification.

ii. The COMCO provides any Person who is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.

The undertakings have the right to express their views during the investigating stage of a procedure orally during interviews and in written at any given time. In addition, at the end of the investigating stage of a procedure, companies have a right to hand in a written statement in response to a written report (statement of objections) of the Secretariat including the evidence, the facts, the applicable law and the preliminary conclusions of the Secretariat. The COMCO bases its decision on the statement of objections of the Secretariat, the written statement of the undertakings and in cases leading to a fine, additional hearings and/or oral pleas of the undertakings.

iii. The Secretariat focuses investigative requests for information that they deem may be relevant to the competition issues under review as part of the Investigation. The Secretariat provides reasonable time for undertakings to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.

When the Secretariat decides to send a request for information to the parties, both the content of the request and the foreseeable burden on the undertakings is carefully considered. The imposed deadline for returning the request for information is chosen according to the expected burden. The setting of the deadline follows the guiding notice on deadlines available on the website of the COMCO ([Merkblatt Fristen im Kartellverfahren](#), (German/French/Italian only)). The parties are allowed to ask for an extension of the deadline.

e) Timing of Investigations and Enforcement Proceedings

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

In merger control, the Merger Control Ordinance ([Ordinance on the Control of Concentrations of Undertakings](#), MCO) sets strict timelines for the procedure. Upon introducing the merger notification, the COMCO must inform the undertaking within 10 days whether the notification is complete. The COMCO then has one month to decide whether to open an Investigation (Art. 31 Cartel Act). The maximum time for the Investigation is 4 months. During this period the merger can be cleared or prohibited or remedies can be decided (Art. 33 (3) Cartel Act).

For Investigations there are no strict time limits that the authority needs to consider. However, every person has the constitutional right to have his or her case decided within a reasonable time (Art. 29 (1) Cst.). It is therefore in the interest of the COMCO to complete the Investigations in a timely manner.

Anticompetitive conduct cannot be sanctioned if the time between the cessation of the anticompetitive behavior and the opening of an Investigation exceeds 5 years (Art. 49 a (3) (b) Cartel Act).

f) Confidentiality

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

i. The treatment of confidential information in competition proceedings is laid out in the Cartel Act, in the Administrative Procedure Act and in the Swiss Criminal Code.

ii. According to Art. 25 of the Cartel Act the competition authorities are bound by the rules on official secrecy. This means that members and staff of the COMCO and its Secretariat cannot disclose confidential information obtained in the performance of their duties. They use confidential information only for the purpose for which it was obtained or for the purpose of the Investigation. Publications of the COMCO must not reveal any confidential information.

iii. The Secretariat takes into consideration the interest of companies and persons and the public regarding the disclosure of confidential information during proceedings (cf. f) ii. above). In closed cases, the Freedom of Information Act ensures public access to administrative documents. Though, it does not provide access to any confidential information. The documents can be consulted (against an administrative fee) at the premises of the COMCO or can be made available as a copy.

The investigated undertakings have a right of access to file during the whole Investigation. However, this right does not include the access to any confidential information.

g) Conflicts of Interest

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

Art. 22 of the Cartel Act and art. 10 of Administrative Procedure Act lay out the rules concerning potential conflicts of interest of the members and staff of the COMCO and its Secretariat. A member or staff that carries a personal interest, that is linked by marriage, blood (collaterally up to the third degree), registered partnership or cohabitation to a party, that is representing the party or was involved as such in the same matter or that can be regarded as lacking impartiality for any other reason must withdraw from the case. If the withdrawal is disputed, the COMCO (excluding the concerned member or staff) will take a decision.

The 13 members of the COMCO need to publish their affiliations, memberships and other represented interests on the website of the COMCO. Art. 21 (3) of the [Federal Personnel Act](#) (German/French/Italian only) prohibits any member of the COMCO and the staff of the Secretariat to accept any gifts in the context of their work.

h) Notice and Opportunity to Defend

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

i) In enforcement procedures, the Secretariat of the COMCO sends a statement of objections to investigated undertakings. The statement of objections provides detailed information on the facts, the evidence, the economic and legal reasoning underlying the alleged violations. It also contains the preliminary conclusions including the projected procedural costs.

In merger proceedings, if the COMCO decides to open a formal Investigation, the COMCO will inform the parties in writing (art. 32 Cartel Act) detailing the areas of concern. Furthermore, the merger notification will be made public to allow any third parties to express their views.

ii. During the Investigation, the parties have a right to access the file. Any confidential information will previously be removed from the files. The investigated undertakings have the opportunity to submit written comments in response to the statement of objections before the COMCO reaches its decision.

iii. As mentioned (above h) ii.) the investigated undertakings have the right to express their views in writing in response to the Secretariat's statement of objections before the COMCO reaches a decision (Art. 30 (2) Cartel Act). They can present, respond to, and challenge any evidence that they deem adequate. Before the COMCO adopts a decision to sanction undertakings it organizes a hearing and/or oral pleas for them (Art. 30 (2) Cartel Act).

i) Representation by Counsel and Privilege

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

According to art. 11 of the Administrative Procedure Act, the parties have the right to be represented by a qualified legal counsel of their choosing. According to art. 11a (1) of the Administrative Procedure Act the authority may appoint a legal representative if more than 20 parties (investigated undertakings) appear in a case with joint or individual submissions in order to assert the same interests. Third parties (affected undertakings and individuals) may be required to appoint a common legal representative if they share identical interests in the same procedure and if their total number exceeds 5 (art. 43 (2) Cartel Act). To date the COMCO has not used this decisional power. So far, investigated companies and third parties have always individually chosen their legal counsel. During dawn raids, the Secretariat must not await the arrival of the legal counsel at the premises, but the legal counsel will have the opportunity to look at the seized documents and to have them sealed. In the latter case the competition authorities will submit a demand to the Federal Criminal Court in order to remove the seal. The Court can approve or reject the demand.

The legal privilege fully applies in all proceedings. The competition authorities cannot seize, use or rely on evidence protected by the legal privilege (art. 50 (1) and (2) Federal Law on Administrative Criminal Law) without the express consent of the beneficiary.

j) Decisions in Writing

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or*

sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.

- ii. *Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

i. The decisions of the COMCO are always in writing and contain a detailed exhibit of the facts, the evidence, the legal and economic reasoning and the conclusions underpinning the decision. The decision also clearly states the remedies and sanctions as well as procedural costs. It will be communicated to the addressee as soon as possible. The COMCO usually publishes a non-confidential version of its decisions on the authority's [website](#) and in the quarterly publication Law and Policy on Competition (LPC) available on the [website](#) (only in German/French/Italian). In case of a disagreement between the authorities and the concerned undertaking about confidential information, the COMCO may issue a publication decision. The parties may appeal this decision at the Federal Administrative Court and the Federal Supreme Court subsequently.

ii. In principle the same as in i. holds true for commitment decisions. Since the authorities and the parties in this case reach an agreement on how to conclude the Investigation, the written decision may be less extensive than a decision in a disputed case.

k) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

All decisions taken by the COMCO, including prohibition, remedy and sanction decisions can be appealed before the Federal Administrative Court (Art 33 let. f [Federal Administrative Court Act](#) (German/French/Italian only)). The Federal Administrative Court is an independent judiciary body, respecting all aspects of art. 6 of the European Convention on Human Rights (ECHR). The Federal Administrative Court has unlimited jurisdiction and will do an in-depth review of the facts and law of the appealed decision.

Some coercion measures can be appealed before the Federal Criminal Court. This mainly concerns measures during dawn raids, for example disputes about the act of seizing certain documents.

An appeal against the ruling of the Federal Administrative Court or the Federal Criminal Court is possible before the Federal Supreme Court (art. 82 – 89 [Federal Supreme Court Act](#) ((German/French/Italian only)). This appeal is only open to the addressee of the decision. The COMCO cannot directly appeal before the Federal Court, but must do so via the Federal Department of Economic Affairs, Education and Research.