



# Switzerland

Patrick L Krauskopf, founder and chairman of AGON Partners, is a qualified attorney-at-law and admitted to all Swiss courts, as well as in New York. In addition to his PhD from the University of Fribourg, he holds an LLM from Harvard Law School. Patrick offers extensive legal and strategic expertise and represents clients in competition and antitrust law in Switzerland, the EU, the US and other jurisdictions. He advises more than 12 governments in competition policy matters.

Blaise Carron joined AGON Partners in 2014 as of counsel. Having obtained degrees from the law schools of both Harvard and Fribourg, he specialises in antitrust law, merger control and construction law. He has published various articles and publications in these areas and acts as a non-governmental adviser to the International Competition Network (ICN). He is also a professor at the University of Neuchâtel and acts as an arbitrator and mediator in numerous domestic and international cases.

**Patrick L Krauskopf**  
patrick.krauskopf@  
agon-partners.ch

**Blaise Carron**  
blaise.carron@  
agon-partners.ch

**Agon Partners Legal AG**  
Zurich  
[www.agon-partners.ch](http://www.agon-partners.ch)

## 1 | What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

The Competition Authority (COMCO) is focusing on examining vertical restraints, especially after a landmark decision of the Federal Supreme Court (FSC), Switzerland's highest court, in 2016 (known as the *Gaba* case). The producer of Elmex toothpaste was fined approximately US\$5 million for preventing its Austrian licensee from exporting its goods into Switzerland. The FSC highlighted that when dealing with hardcore violations, COMCO does not have to prove the extent to which competition is effectively hindered. This decision has led the FSC to depart from an effect-based analysis and has laid the groundwork for an analysis 'by object'. For similar reasons, the FSC confirmed the fines imposed upon both BMW AG (approximately US\$165 million) and NIKON (approximately US\$13 million) for preventing imports into Switzerland.

Concerning hardcore horizontal cartels, COMCO is still investigating banks and other financial institutions for possible collusion in the FX spot market, after having settled its four-year investigation in 2016 into the rigging of interest rates (approximately US\$100 million).

## 2 | What do recent investigations in your jurisdiction teach us?

We noted that COMCO is relying increasingly on economic evidence to tackle cartels. Its strong economic know-how is leading law firms to invest more in their own economic expertise by hiring well-trained economists, which AGON did years ago. In addition, we noticed COMCO's willingness to publish its decisions in press releases and other public statements. For both undertakings that are under scrutiny and their lawyers, litigation PR, including social media, is becoming a central part in developing an effective defence strategy.

In addition, COMCO increasingly cooperates with foreign authorities owing to cases with an international impact.

## 3 | How is the leniency system developing, and which factors should clients consider before applying for leniency?

The leniency system is well established, and at present many cartel investigations are triggered by leniency applications. Before applying for leniency, especially in international cases, the applicant should properly assess the nexus to Switzerland. Furthermore, legal difficulties in internal investigations may arise in relation to Swiss data protection laws.



Patrick L. Krauskopf

Blaise Carron

When looking for a profitable antitrust settlement, parties must know the Swiss particularities that COMCO developed over the past few years.

**4 | What means exist in your jurisdiction to speed up or streamline the authority's decision-making, and what are your experiences in this regard?**

To speed up decision-making, COMCO provides important incentives to make an amicable settlement worth considering, notably in relation to potential claims or class actions in or outside Switzerland. Usually, COMCO will (1) abstain from carrying out an extensive investigation of the facts and from undertaking a legal assessment of the accusations (which is in contrast to the EU); (2) only make a summary description of the facts and the legal assessment; (3) consider the signing of an amicable settlement as constituting a mitigating factor when calculating the fines; (4) refrain from disclosing the individual sanction calculations; and (5) not ask parties to acknowledge the description of the facts or the legal assessment. Those undertakings are not required to enter a guilty plea.

“In Switzerland, private cartel enforcement increased further in 2018, especially in the aftermath of bid-rigging cases.”

COMCO has gained solid experience in conducting amicable settlement procedures. At the very beginning of the amicable settlement procedure, the parties and COMCO itself sign a framework agreement. A template of such an agreement was officially made public in early March 2018 and provides legal certainty both to the parties and to COMCO, should the negotiations fail.

**5 | Tell us about the authority's most important decisions over the year. What made them so significant?**

COMCO's fight against bid-rigging cartels in public procurement procedures, as well as in private markets, is a top priority. Almost every region of Switzerland is subject to COMCO's scrutiny. COMCO's decisions showed a remarkably tough approach toward such illegal behaviour. To reach early decisions, COMCO split an umbrella investigation against a wide bid-rigging case in the canton of Graubünden into 10 separate cases. For each case, COMCO is eager to reward leniency applicants and an undertaking's readiness to settle cases. It is also showing a strong determination to prosecute non-settling parties, by using all the powers it has at its disposal. COMCO

has also examined contractual relationships between general importers of various car brands and dealers, and has recommended cooperation with those companies that are not operating in distribution.

**6 | What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?**

COMCO's decisions are subject to judicial review by the Swiss Federal Administrative Court (FAC), where appeals must be filed within 30 days. The FAC has full jurisdiction to review COMCO's findings, including all aspects of facts and law. The FAC's judgment can be appealed to the FSC, which acts as an appellate tribunal. The judicial control is effective. There has been a substantial increase in the number of cases decided by the courts in the past years.

**7 | How is private cartel enforcement developing in your jurisdiction?**

In Switzerland, private cartel enforcement increased further in 2018, especially in the aftermath of bid-rigging cases ('follow-on claims'). Approximately a dozen stand-alone claims were introduced in the car dealers' markets, after COMCO issued a preliminary report stating that car producers have a dominant position in the 'after-sales' markets. However, court decisions have shown that it is still a challenge for plaintiffs to engage in private enforcement before most of the 26 state courts dealing with cartel cases. Courts are struggling to assess market structure and deal with the theory of harm, even though it is accepted by COMCO and other foreign jurisdictions. In addition, there is the substantial risk that the plaintiff will ultimately have to bear the cost of the proceedings, along with the attorney's fees for both parties.

**8 | What developments do you see in antitrust compliance?**

There is still an awareness gap between small and medium-sized enterprises (SMEs) and large undertakings where compliance is concerned. Notably, Swiss SMEs are still reluctant to implement adequate antitrust compliance programmes. It might be worthwhile for the legislature to consider enhancing compliance incentives – for instance, by allowing the compliance defence. COMCO's case law indicates that the agency is open to accepting the compliance defence under certain conditions.

The principal challenges facing clients lie in keeping their own IT departments up to date to prevent and monitor possible violations, and – especially in local markets that have a culture of long-standing relationships – changing the patterns

of behaviour that, until now, have been traditional when being in contact with competitors (eg, within trade associations).

**9 | What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?**

We believe the scope of application of private enforcement will continue to increase in the coming years. On one hand, this is a result of the need for enterprises to settle antitrust matters in a fast and efficient way and, on the other hand, COMCO is working at its full capacity and is therefore not able to handle all of the cases. Hence, parties are advised to pay particular attention to the collection and evaluation of evidence.

# The Inside Track

What was the most interesting case you worked on recently?

We are working on a bid-rigging case in which our team of economists is seeking to challenge the agency's assessment based on econometrical evidence. The case is pending at the Federal Administrative Court, and AGON has already been successful in respect of certain specific issues. As econometrical evidence becomes increasingly important in cartel cases, our team of economists is proving to be of the utmost importance in defending our clients.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

Improving private enforcement. Litigation before Swiss civil courts is still underdeveloped when it comes to competition law. We are currently handling different cases in this area and we see much room for improvement in respect of the present legal framework.