Explanatory note of the Secretariat of the COMCO

Selected instruments of investigation

of 6 January 2016

English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and is not legally binding.

A. Purpose

1. This note outlines the proceeding of the Secretariat for its investigations, namely, for the execution of investigative measures in accordance with Article 42 of the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (Cartel Act, CartA) that is, for the execution of searches and seizures of evidence (Article 42 (2) CartA) as well as hearings (Article 42 (1) CartA). Furthermore, the duty to provide information in accordance with Article 40 CartA is addressed.

B. Searches

1. Legal basis

2. Pursuant to Article 42 (2) CartA, the competition authorities may order searches of premises and seize any evidence. The Articles 45–50 of the Federal Act of 22 March 1974 on Administrative Criminal Law (AACL) apply by analogy to these coercive measures.

3. Pursuant to Article 42 (2) CartA, searches of premises and seizures are ordered by a member of the presiding body of COMCO in response to a motion from the Secretariat *(= search warrant)*.

2. On-site procedure

a. Beginning of the search

4. The Cartel Act provides that the “investigating officer“ must identify him or herself to the “holder of the premises” before beginning the search and he must notify the holder about the reasons for the search (Article 49 (1) and (2) AACL).

- The “investigating officer” is the person who leads the search team of the Secretariat *(= team leader)*.
- For legal entities, the “holder of the premises“ is the managing director (CEO), respectively, the hierarchically highest present person in the undertaking. This person is the primary contact for the Secretariat *(= company representative)*.

5. In practice of the Secretariat, the team leader hands over and explains the following documents to the company representative:

- *A copy of the search warrant* (Article 49 (4) AACL). The evidence, which is to be searched for and seized, is listed in the search warrant.

- *The notice which indicates the opening of an investigation in accordance with Article 27 CartA*. Typically, this notice is handed over to the representative during the search. This document states the reasons for the search.

- *The notice regarding legal remedies* with all relevant substantive and procedural law provisions. The team leader explicitly refers to the right to appeal in accordance with Article 50 (3) AACL.

- *The explanatory note and form of the Secretariat for the leniency program*. According to the practice of the competition authorities, it is possible to apply for leniency during a search (cf. marginal 30 in the explanatory note for the leniency program).

6. The company representative must acknowledge on the first page of the search and seizure report that he received the aforementioned documents.

7. Pursuant to Article 49 (2) AACL, the search team must call upon the assistance of an "official", designated by cantonal law, to the search. This is usually a representative of the local authorities (e.g. the prefect or an official from the debt enforcement office). The official ensures that the measures do not deviate from its purpose. The team leader introduces the official to the company representative and asks whether the representative wishes the presence of the official or waives his or her presence. It will be placed on the first page of the search and seizure report if the representative waives the presence of the official immediately. The representative can waive the presence of the official any time afterwards.

b. No waiting time for the attorney

8. The undertaking concerned by the search has the right to consult an attorney.

9. If there are no attorneys on-site, the search team does not wait for their arrival in order to begin with the search of the offices, and securing documents and electronic files. The discovered evidence will be collected and put aside during the absence of the attorneys. After their arrival on-site the attorneys can review the evidence, comment on its content, and eventually, request a sealing.

c. Search

10. Pursuant to Article 48 (1) AACL, the search team has the right to search all types of premises, both business premises and private apartments, either of the addressee of the investigation or of a third party. Furthermore, all containers located within these premises can be searched (e.g. cabinets, desks, safes). The search team is also authorized to search openly accessible localities (e.g. gardens, car parking) and vehicles.

11. In addition, the search team is authorized to search through paper documents in accordance with Article 50 (3) AACL. This includes all types of records, regardless whether they are recorded on paper or on other media, and regardless whether they are written documents or other records, such as photos, videos or audio recordings.

12. In the field of electronic data, the search authorization extends to all data that can be accessed from within the searched premises *(principle of accessibility)*.

13. The Secretariat adheres to the *principle of proportionality* throughout the entire search and tries to keep the interference with the business operations of the undertaking as limited as possible, and it tries to consider legitimate concerns of the undertaking.

14. If certain premises cannot be searched immediately, they will be sealed to secure the potential evidence they may contain. In practice, the Secretariat seals off the door, which

subsequently cannot be opened without damaging the sealing strip. To prevent an unintended breach of seal, a clearly visible stop sign is posted on the door.

15. Pursuant to Article 290 of the Swiss Criminal Code of 21 December 1937 (Criminal Code, CC), any person who breaks open, removes or renders ineffective an official seal (= breaking the seals) is liable to a custodial sentence not exceeding three years or to a monetary penalty.

d. Rights and duties of the persons concerned

16. Pursuant to Article 49 (2) AACL, the "holder of the premises" is entitled to assist the search, he has a *right to participate*. However, this assistance does not constitute a legal requirement for the search. There is no obligation to participate in the search. In practice, the Secretariat involves the company representative as well as the person whose workplace is being searched.

17. If documents or other records are to be searched, the "holder of the documents" has the right to comment on their content in accordance with Article 50 (3) AACL before the search takes place *(right to comment)*. However, he has no obligation to do so. The right to comment gives the person concerned the opportunity to indicate, if a certain document is private (Article 50 (2) AACL), or if there is a ban on search or seizure of evidence (Article 50 (2) and Article 46 (3) AACL) (cf. hereinafter marginal 21 et seq.). In practice, the Secretariat acknowledges the right to comment to both the company representative and the employee whose documents are being searched.

18. The persons concerned have a *duty to submit to the search*, that is, to endure the search passively and not to prevent or impede it. Part of the duty to submit is to grant access to the rooms to be searched, containers and computer systems, by, e.g., opening doors and safes and disclosing passwords.

19. Violations of the duty to submit may be classified as preventing an officer from performing duty (Article 286 CC). Any person who hinders, delays or obstructs an act by an official from performing duty, is liable to a monetary penalty not exceeding 30 daily penalty units. It may be prevention of an official act when the search team is prevented of entering the premises to be searched, or when evidence is destroyed, deleted or concealed. The Secretariat reserves the right to file a criminal offence report in such acts. Violations of the duty to submit may also be considered for the calculation of sanctions as aggravating circumstances in accordance with Article 5 (1) let. c of the Ordinance on Sanctions imposed for Unlawful Restraints of Competition of 12 March 2004 (Cartel Act Sanction ordinance, CASO).

20. The persons concerned have *no duty to cooperate*. They are not required to actively participate in the search. Relevant information as to, e.g., localities, filing system or computer system can lead to a limitation of the search and the interference with the business operations of the undertaking. However, there is an obligation to fully cooperate as soon as the undertaking decides to file for leniency in accordance with Article 49a (2) CartA in combination with Article 8 ff. CASO, to obtain complete immunity from a sanction or a reduction of the sanction (Article 8 (1) let. c CASO).

e. Attorney-client privilege

21. Pursuant to Article 50 (2) AACL, during the search, "confidentiality must be preserved in relation to official secrets as well as secrets that have been disclosed to members of the clergy, lawyers, notaries, doctors, pharmacists, midwives and their professional assistants in the exercise of their office or profession." In practice, the *attorney-client privilege* in particular is relevant.

22. Article 46 (3) AACL specifies the ban on search and seizure of evidence in relation to the attorney-client privilege as follows: “Items and documents from communications between a person and his or her lawyer cannot be seized, provided the lawyer is entitled to represent clients before Swiss courts in accordance with the Attorney Act of 23 June 2000 (AttA), and is not accused of an offence relating to the same case.” Subsequently, the following conditions have to be met for a document to be protected from search and seizure:

- *An attorney who is entitled to representation before Swiss courts in accordance with the AttA:* Based on this provision, communication with *corporate jurists* without the certificate of admission to the bar is not protected from the outset. Even corporate lawyers based on Article 8 (1) AttA are excluded from the scope of protection. Communication with attorneys, who are registered in a cantonal register for lawyers, is protected (Article 4 AttA), as well as with persons from Member States from the EU or EFTA, who are authorized to exercise legal profession in their country of origin. This also means, that communication with attorneys from other states as the ones mentioned above is not protected.

- *Profession related activity:* Only the communication in the context of the professional legal activity (profession related) is protected, namely, litigation and legal advice. The attorney-client privilege does not extend to facts, which were learned in a non-professional context. An activity is non-professional if the commercial element predominates, in particular such, performed by banks, trust agencies, or fiduciaries. In particular asset management, board of director mandates, management or secretariat of a trade association, fastidiousness, mediation or debt collection mandates are not considered to be professional. In addition, facts, which the attorney has learned in connection with his private, political or social activity are not protected.

- *Documents issued in connection with a mandate:* These documents not only concern correspondence in the usual sense, such as letters or e-mails, but also own recordings, legal assessments in advance of a process, notes of meetings, strategy documents, and drafts of contracts or settlements. It is crucial for the protection, that these documents, to some extent, represent the materialization of the communication that was made within the protected scope of relationship of trust. However, pre-existing, genuine evidence that was originally not prepared for attorneys, even if they have been forwarded to the attorney (e.g. as enclosure or attachment in an e-mail) are not protected.

- *Attorney who is not accused himself/herself:* Exceptionally, protection is not granted, when the attorney himself/herself is accused in the same or in a connected case, this is, if he himself/she herself is involved in a violation of the Cartel Act.

23. The correspondence between attorney and client is protected regardless of the time of their creation and *irrespective of the place* where they are located. This means, it is protected whether it is located in the law firm or in the undertaking.

24. If the attorney-client privilege is invoked, an actual examination of the document is excluded, not however, *a quick review and summary examination,* in order to determine, whether the protection of the attorney-client privilege was invoked legitimately or not.

f. Appeal and sealing

25. The ”holder of the documents“, in particular, the company representative and the actual concerned employee, both have a right to appeal against the search of documents and other recordings (Article 50 (3) AACL). In case of appeal, the documents are sealed and kept

safeguard, and the Appeals Chamber of the Federal Criminal Court decides on the admissibility of the search. Namely, the appeal serves to protect documents from an examination, if the “holder of the documents” believes that they fall under the prohibition of search or seizure of evidence.

26. The appeal shall be filed immediately or, at the latest, at the end of the search. The appeal can concern certain documents specifically, or generally, the entire search of all documents and recordings. The appeal may be filed orally or in writing. In practice of the Secretariat, the appeal may be invoked by checking a correspondent box in the search and seizure report.

g. Seizure of paper documents

27. The *potential eligibility of the proof* is sufficient for the seizure of evidence, this is to say, the possibility, that a document may directly or indirectly provide evidence for the action or its circumstances. It lays in the nature of this coercive measure that certain among the seized papers turn out to be irrelevant for the investigation.

28. The Secretariat has the authority to seize the *original documents*. In practice, the secretariat has a scanner and tries – if timely and technically feasible – to make *scans* or photocopies of the documents on-site, so that a major part of the originals can be left with the undertaking.

29. The seized documents are listed in the search and seizure report (Article 47 (2) AACL). The “holder of the premises” recieves a copy (Article 47 (1) AACL). In practice, an electronic copy of the scanned documents is handed out.

30. The seizure may be enforced compulsorily. If an object is seized, the *removal of seized property* in accordance with Article 289 CC is chargeable with a custodial sentence not exceeding three years or a monetary penalty.

h. Securing electronic data

31. In practice of the Secretariat, electronic data is not searched through on-site, but merely secured. This means, that the content of the electronic data will be acknowledged afterwards in the premises of the Secretariat by using a special (forensic) software. By securing the data, the right to be present by the person in possession of the documents is maintained, this means, that he has the right to be present during the search in the premises of the Secretariat (cf. hereinafter marginal 36 ff.).

32. Securing the data on-site can either be done by the seizure of the original volume, or by producing a duplicate (mirror/image) or a copy.

33. It is possible to appeal against the search of the data in accordance with Article 50 (3) AACL. In such cases, the volumes are sealed (cf. marginal 25 f.).

i. Unsealing

34. If paper documents or electronic data has been sealed, the Appeals Chamber of the Federal Criminal Court is responsible for the unsealing (Article 50 (3) AACL). First, the Federal Criminal Court examines the lawfulness of the search and then separates the documents that are protected by professional privilege or documents that are obviously of private nature.

35. The process of unsealing is set off by a request for unsealing by the Secretariat. According to the practice of the Secretariat, prior to filing a request for unsealing, the Secretariat asks the concerned undertaking, if it wants to hold on to the appeal or if the separation

of the protected documents shall be carried out by the Secretariat together with the undertaking *(informal unsealing)*.

3. Data analysis by the Secretariat

a. Common process

36. Pursuant to Article 50 (3) AACL, the “holder of the documents“ must have the opportunity to comment on the content before the search. This means, that the undertaking, by an own representative and/or an attorney, has the right to participate in the search through the electronic data in the premises of the Secretariat. The participation is voluntary, the undertaking can also renounce from it.

37. In order to separate professional secrets, the Secretariat has developed two alternative procedures: The first option is a special *preliminary triage* of the protected documents before the actual examination of the data. The second option consists in separating the protected documents *ad hoc*, during the search. In either case, the data has to be technically prepared previous to a possible triage or search.

38. At the end of the search – which is usually a time-consuming data analysis – the undertaking will be informed about the documents the Secretariat considers as potentially relevant. At this moment, the undertaking will in any case have the opportunity (even if it waived the right of being present during the search), to comment on the content, and to file an appeal regarding the protection of professional secrets. Simultaneously, the undertaking can indicate business secrets it wishes to be redacted.

b. Preparing the data

39. At this first step, the data that was seized on-site is copied onto a server of the Secretariat that serves the only purpose of forensic analysis of electronic data and that is separated from the rest of the network of the Secretariat.

40. The copied data *(working copy)* is then indexed by a forensic software, this means, that it is automatically prepared by the program for the search afterwards. The consequence of the *indexation* is, that the data can, subsequently, be explored using keywords. Both the creation of a working copy on the server as well as the indexing process can be carried out without acknowledging the content of the data.

41. The preparation of the data is terminated with a *final inspection*. This final inspection is to ensure that all data were copied and indexed correctly and that all file formats are readable and searchable. The final inspection requires a quick access to the data in order to test a random keyword, to verify if the keyword search works.

42. The preparation of the data as well as the final inspection are performed by IT specialists of the Secretariat, who are not entrusted with handling the case.

c. Option preliminary triage

43. A preliminary triage takes place before the electronic data is passed on to the case handlers (case team) for the search. The preliminary triage is carried out by employees of the Secretariat in the presence of a company representative or an attorney. The employees are not part of the case team and are obligated to treat any findings of the preliminary triage confidentially.

44. The undertaking is required to participate in the preliminary triage. The undertaking has to indicate the documents, which could be protected by professional secrecy. The undertaking should at least be able to indicate the keywords which enable the employees to find the documents that might be protected by professional secrecy (e.g. by indicating the names of the attorneys or law firms from whom most likely there are communications in the data).

45. The documents which are allegedly protected by the professional secrecy are screened by the designated employees of the Secretariat. If the employees agree on the protection of certain documents, those documents are deleted from the data set. Thereafter the undertaking receives a copy of the deleted documents. If the protection of a document is controversial, the document will be exported and saved onto two external volumes, which subsequently will be sealed. Then, the document will be deleted from the working copy on the server. Should the Secretariat request access to the sealed documents, it has to carry through an unsealing process before the Federal Criminal Court. One of the two sealed volumes will be sent to the Federal Criminal Court, while the other one stays in possession of the Secretariat for security reasons. The undertaking receives an unsealed copy of the exported, controversial data.

46. The only purpose of the preliminary triage is to remove the documents, which cannot be examined or seized due to official or professional secrecy. Additionally, documents of *obvious* private nature will be removed (e.g. holiday pictures). However, in the context of the preliminary triage, it is not discussed or decided about the relevance or irrelevance of documents for the investigation.

47. The duration of the preliminary triage depends on the amount and volume of the documents that have to be screened. In the previous practice of the Secretariat, the preliminary triage could be carried out in approximately one to two days.

48. As soon as the preliminary triage is completed, the case team will have access to the redacted data set on the server and it can examine and analyze it. In practice, undertakings mostly refrain from being present during the analysis after the preliminary triage.

d. Option ad hoc

49. The *ad hoc* removal is more time consuming than the preliminary triage and makes sense, if the undertaking wishes to be present during the entire data analysis. The ad hoc removal is carried out by the case team.

50. During the data analysis, the present company representative or the attorney respectively can intervene directly if a document is found, which might be protected by professional secrecy. In that case, the employees of the Secretariat will screen the document superficially, like a paper document would be screened during a search on-site. If the parties agree on the protection of the document, this document will be deleted. Should the protection of the document be controversial, it is exported and saved onto two external volumes, which subsequently will be sealed. Subsequently, the document is deleted from the working copy of the server. Should the Secretariat request access to the sealed documents, it has to carry through an unsealing process before the Federal Criminal Court.

51. The duration of the data analysis depends on the size of the electronic data and the complexity of the case. It can take several weeks. At times, technical problems may occur, which can slow down the process or can lead to cancelling or suspending a screening appointment on short notice.

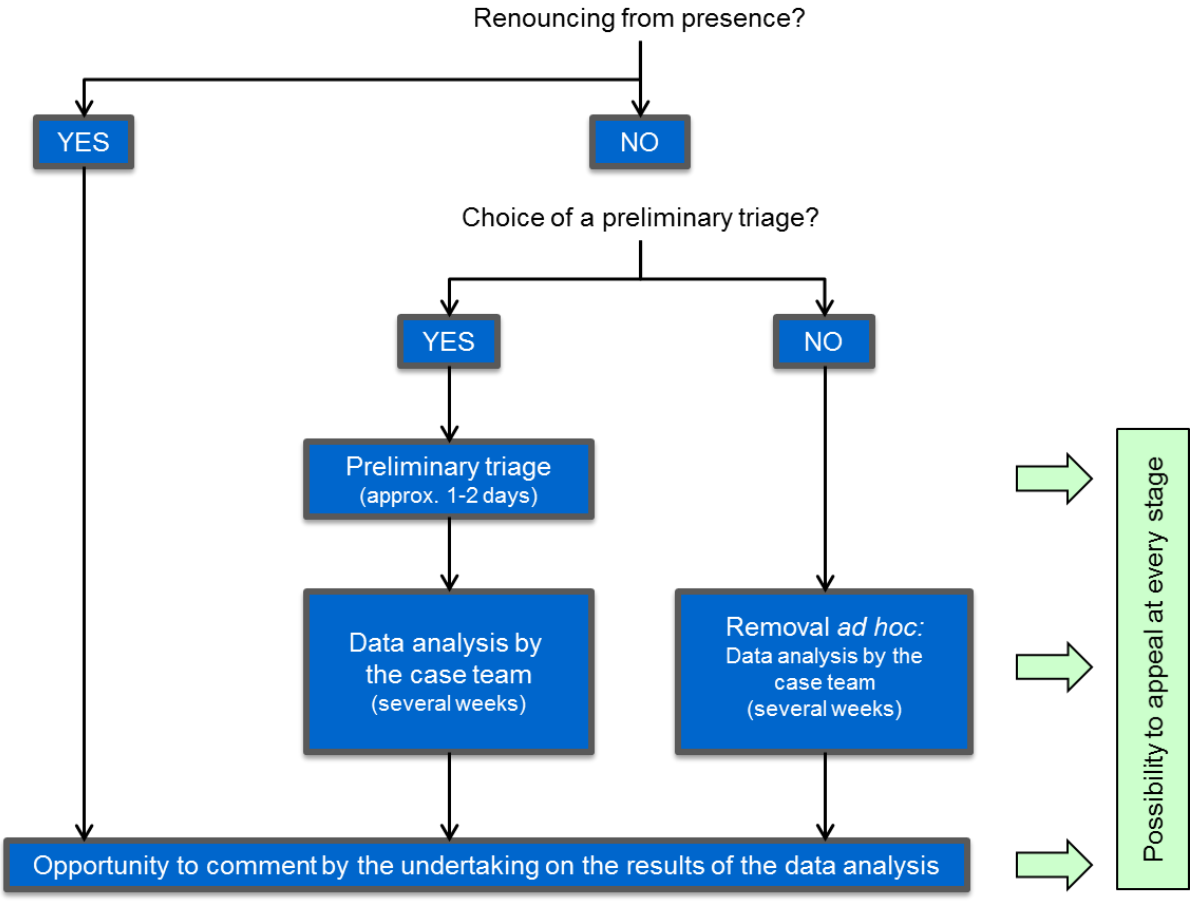
52. The planning and the execution of the data analysis are unilaterally determined by the Secretariat, this also in regard to the scheduling. The Secretariat will communicate sufficiently in advance the dates on which a screening can take place to the undertaking. It is then incumbent upon the undertaking to ensure its presence on the communicated dates.

e. Result of the data analysis

53. At the end of the data analysis, the undertaking will in any case – regardless of whether a preliminary triage took place or the undertaking was present during the screening– receive those electronic data from the Secretariat for comments, which it considers to be potential evidence. At this moment, the undertaking will have (again) the opportunity to object and to claim, that certain documents are protected by professional secrecy. Simultaneously, the undertaking has to identify business secrets, which it deems have to be redacted.

f. Diagram

54. The following diagram outlines the possible courses of action a person concerned has:



C. Interrogations

1. General provisions

a. Legal basis

55. Pursuant to Article 42 (1) CartA, the competition authorities may hear the persons who are concerned by an investigation, meaning, the parties *(= interrogation of parties)*, as well as third parties *(= interrogation of witnesses)*.

b. Procedural role

56. Antitrust investigations are directed towards undertakings regardless of their legal or organizational form (Article 2 (1^{bis}) CartA). In practice, most undertakings are constituted as legal entities. Legal entities are represented by their *formal and de facto organs*. If an investigation is directed towards a legal entity, their formal and de facto organs are heard as parties. Other current or former employees of the undertaking however are heard as witnesses.

c. Summons

57. The individual person chosen for the interrogation shall be summoned. The *summons* contains the following information:

- *Procedural capacity:* The summons specifies whether it is an interrogation of parties or an interrogation of witnesses.
- *Date and beginning of the interrogation:* It should be noted that interrogation may last for several hours.
- *Place for the interrogation:* Usually, interrogations take place in the premises of the Secretariat. In case of simultaneous hearings and searches, other places for the interrogations will be determined (e.g. nearby police station or, after consulting with the concerned persons, in the premises of the undertaking to be searched).
- *Subject of the interrogation:* The subject of the interrogation is described summarily. Additionally, it is specified, in line with which investigation the hearing takes place.

d. Consulting an attorney

58. The person interrogated has the right to consult an attorney. It should be noted that the attorney of the investigated undertaking cannot be the attorney of a witness (e.g. of an employee of the undertaking without organ function) at the same time.

e. Time span between summons and interrogation

59. If the interrogation is conducted during or after a search, the summons is usually handed over by the team leader of the search team. If the person concerned wishes to consult an attorney during the interrogation– provided that it is necessary to ensure an effective defense –a time span of four hours between handing over the summons and the interrogation should be observed.

60. Summons for interrogations that are not carried out during or after a search, are sent out by registered mail sufficiently in advance. Postponements are only possible for compelling and justified reasons (e.g. accidents, illness, death in the family).

f. Proceeding of the interrogation

61. The interrogation allows the Secretariat to take personal evidence, meaning, persons disclose their knowledge and perceptions on legally relevant facts, or generally, on the subject of the investigation. The representing attorney can therefore not make a statement instead of the interrogated person. The attorney rather assists the interrogated person in protecting his or her interests, e.g., by asking appropriate supplementary questions. Since not the attorney is questioned, he does not sit beside, but behind the questioned person during the interrogation, if the space in the room allows it.

62. At the beginning of the interrogation the interrogated person is:

- questioned about their *personal data*;
- informed about the *subject* of the antitrust investigation;
- informed about the procedural *capacity* they hold during the interrogation; and
- informed about their *rights and duties* (e.g. on the right to remain silent, cf. marginal 68).

63. At the end of the interrogation, the attorney is granted the opportunity to ask supplementary questions.

64. Neither the interrogated person nor their attorney is allowed to film or record the hearing.

g. Protocol

65. In practice of the Secretariat, the statements by the interrogated person are not recorded literally, yet the protocol should reflect the content of the statements as closely as possible. Not only the answers, but also the questions and possible reservations are protocolled. The protocol is then read out by sections, so that the heard person can indicate, if he or she thinks, that a section of the protocol does not correspond with the statements. These corrections, comments or clarifications are added in the protocol. If the premises allow it and if it is technically feasible, the protocol is projected during the reading, so that the interrogated person and his or her attorney can read it simultaneously.

66. At the end the interrogated person has the opportunity to read the entire protocol. The protocol is to be initialed on each page and to be signed on the last page.

67. The interrogated person receives a copy of the protocol, however, handing over the copy may be postponed in time due to tactical procedural reasons (especially if there is a risk of collusion).

2. Interrogation of parties

68. At the beginning of the interrogation of a party, the interrogated person is informed explicitly that:

- he or she is not obliged to make statements, but that he or she has the right to remain silent without any explanation, neither generally nor regarding specific questions *(right to remain silent)*;
- statements are recorded and can be used as evidence.

69. During interrogations of parties, the possibility of filing a *leniency application* and their consequences will be indicated. Should a party wish to file a leniency application, the interrogation is suspended and continued as an oral leniency application and protocolled as such (protocol of the oral leniency application, respectively, if a leniency application has already been filed, as an oral supplement to the leniency application).

3. Interrogation of witnesses

70. In interrogations of witnesses, the heard person is informed at the beginning of the interrogation, that:

- he or she is obliged to testify *(duty to testify)*;
- he or she must tell the truth *(duty of truthfulness)*;
- perjury in accordance with Article 307 CC is chargeable with a custodial sentence not exceeding 5 years or a monetary penalty;
- the duty to testify is restricted by the *rights to refuse testimony* (Article 16 AACL combined with Article 42 Federal Act on Federal Civil Procedure). Testimony can be refused, if answering the question can, to the heard person himself or herself, his or her spouse or close relatives, (1) risk criminal prosecution or (2) may suspend severe deprivation of honour or (3) would cause an immediate pecuniary damage.

71. The witness is entitled to compensation that covers reimbursement of travel expenses as well as, in case of self-employment, compensation of the loss of revenue.

D. Request for information

1. Legal basis

72. Pursuant to Article 40 CartA, parties to agreements, undertakings with market power, undertakings involved in concentrations and affected third parties shall provide the competition authorities with all the information required for their investigations *(duty to provide information)* and produce the necessary documents *(duty to disclose)*.

73. Pursuant to Article 52 CartA, any undertaking that does not, or does not completely fulfil its obligation to provide information or produce documents shall be charged up to 100‘000 Swiss francs. Individuals who intentionally do not follow an order regarding the duty to provide information or do not completely follow, shall be charged up to 20’000 Swiss francs.

2. Request for information by the Secretariat

74. In practice, the Secretariat sends its request for information *(= questionnaires)* in writing and sets a deadline for the answers. An extension of the deadline is possible according to the *explanatory note on deadlines*.

75. The Secretariat points out in its request for information that the competition authorities have to protect official secrets and business secrets and it requests from the addressees to indicate information that constitute business secrets *(cf. explanatory note regarding business secrets)*.

76. If the request for information is not answered, the Secretariat can, in consultation with a member of the presiding body of the Competition Commission issue an order to disclose information threatening a sanction in case of non-compliance. Depending on the facts, there is also the option to carry out a search of premises instead.