Remarks on the Ordinance on Fines

Section 2: Calculation of Fines

Section 2 of the present ordinance contains essential guidelines for the calculation of appropriate fines in accordance with the framework of the law. It is the duty of the law enforcing authorities to impose fines in specific cases on the basis of these parameters.

The calculation of appropriate fines, which occurs in three stages, is to a large extent inspired by the EU guidelines[1].

Article 2: Principles

Paragraph 1

Article 49a paragraph 1 ACART lays down a maximum limit that can be determined objectively (10 per cent of the turnover in Switzerland to cover the last three financial years). This paragraph lays down according to Article 49a para. 1 ACART the calculation criteria which determine the amount of the fine (gravity, duration, and – insofar as this can be ascertained – the profits accruing from the anti-competitive practices in question). It will be in particular held account of the profit in the following way: The "normal" profit is already included in the basic amount. An extraordinarily high profit will be taken into account as an aggravating circumstance in accordance with art. 5 ACART. For exceptional cases, in which no profit was obtained, the competition authority may take it into account as an attenuating circumstance.

Paragraph 2

This paragraph explicitly mentions the general principle of proportionality (Art. 5 para. 2 of the Constitution) since this principle has a particular importance concerning the determination of sanctions in competition law. According to this principle, the authorities will take into account the financial standing of the enterprise.[2] Indeed, it would violate the fundamental purpose of cartel law if by virtue of the intervention of the Competition Commission a “sound” company were to be driven out of business, i.e. because the fines imposed forced it into bankruptcy. In the same way, the Competition authorities may take into

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[1] Guidelines on the method of setting fines imposed pursuant to the EEA Competition Rules, Official Journal, C 10/14 of 16.01.2003, "EU-Guidelines".

[2] In particular, payment by instalments could be considered under certain circumstances.

account in a suitable way the fines already imposed abroad for the same infringement.

Article 3: Basic amount

The starting point is the basic amount. This is up to 10 per cent of the turnover achieved on the relevant market concerned (product and geographic market) in Switzerland over the last three financial years. The following must be taken into consideration:

a) The relevant market does not go beyond the Swiss market, even if the restriction on competition has international effects. Otherwise, the relevant market is defined in analogous to art. 11 para. 3 of the ordinance on merger control (RS 251.4). The product market includes all goods or services that are considered by the opposite party in the market as substitutes in view of their characteristics and foreseeable purposes of use; The geographic market includes the territory in which the opposite party in the market offers or demands the goods and services covered by the product market.

b) The proposed basic amount corresponds – in accordance with the empirical findings of the OECD – to a rather "modest" profit (unlawful cartel or monopoly profits). A study of cases in several OECD countries carried out by the Organisation for Economic Cooperation and Development in 2002 estimated the "minimum profit" derived from anti-competitive practices as an average of between 15 and 20 per cent of the turnover made in the market in question in the last financial year.[3] If the (ascertainable) unlawful cartel or monopoly profit is in excess of the basic amount, this will duly be taken into account in accordance with Article 5.

c) As regard to the calculation of the turnovers, art. 9 ACART is applicable in analogous. The turnover in markets affected by anti-competitive practices is in most cases smaller than the company's *total* turnover. The market turnover which serves for calculation of the specific fines is thus usually much smaller than the turnover on which the maximum amount of Article 49a paragraph 1 ACART is based.

d) When compared internationally, the basic amount is not especially high. In contrast to other countries the present ordinance takes into consideration only the turnover in relevant markets in Switzerland affected by restraints of competition, and not – as is the case in the US guidelines[4] – the turnover worldwide, which is usually much greater.

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[3] Fighting Hard-core Cartels: Harm, effective sanctions and leniency programmes, p. 88.

[4] US Sentencing Guidelines for organizations, § 2R1.1 d [1]: 20 per cent of worldwide turnover.

A range up to 10 per cent makes it possible to take into consideration the gravity of the kind of anti-competitive practices involved (Article 5 paragraph 3/4 ACART or Article 7 ACART). For example a horizontal agreement between competitors for restraints on the three most important competitive parameters (price, quantity, territory), will usually be considered more serious than a purely territorial agreement. In addition, the various abuses of dominant positions have also different ranges of restrictive effects. For the most serious infringements of the ACART, in particular as regard to agreements in the sense of Art. 5 para. 3 and 4 ACART and those in the sense of Art 7 ACART, the basic amount will be located regularly in the higher third of the fork of up to 10 percent.

On the other hand, concerning cases of minor importance and according to the principle of proportionality, a lower basic amount may be considered.

Article 4: Duration

In a second stage, the amount of the fine will be increased in cases where the unlawful practice has lasted for more than one year. The increase in the size of the fine in relation to the duration of the offence also corresponds to the provisions of the EU guidelines, i.e. an increase of up to 50 per cent for the first five years, and of up to 10 per cent for each subsequent year.

In accordance with Article 49a paragraph 3 lit. b ACART such practices cannot be punished with fines (Article 49a paragraph 1 ACART) if the restraint of trade ceased more than five years prior to the beginning of an investigation (Article 27 ACART). If an investigation is begun prior to the expiry of this 'statute of limitations' – e.g. into a cartel that has lasted seven years – the entire duration of the cartel will be taken into consideration in calculating the fine.

Articles 5 and 6: Aggravating and Attenuating Circumstances

In a third step the amount of the fine can be increased or reduced in specific cases to reflect aggravating or attenuating circumstances. Neither of the Articles contains a definitive listing of the circumstances to be taken into consideration. Above all, no attempt is made (as in the EU) to tell the authorities what exact weight to give to such circumstances in specific cases.

Not relevant for the setting of the fine is whether or not the presumption of the removal of effective competition (in accordance with Article 5 paragraph 3/4 ACART) is confirmed or shown to be false and whether the charge of price-fixing is shown to be inadmissible in the sense of a ”merely” significant unlawful restraint of trade in the sense of Article 5 paragraph 1 ACART. The only decisive factor is the nature of the agreement, e.g. an agreement on

price-fixing. Insofar as calculation of the fine is concerned, a comprehensive restrictive agreement on prices between all market participants that totally eliminates competition will in any case be given a different weight to an unlawful agreement which only restrains trade significantly (e.g. between individual SMEs).

Article 5: Aggravating Circumstances

Paragraph 1

The aggravating circumstances are described in a general rather than a definitive way, and will be taken into consideration with infringements of all kinds (Article 5 paragraph 3/4 ACART or Article 7 ACART). An undertaking that adopts an unlawful attitude to benefits and risks should find that such an attitude does not really pay dividends. The spirit of the law to aim for effective prevention is thereby taken into account.

Lit. b

The presumed profit from such practices is often difficult to prove (cf. the long-running vitamins cartel or cartels to uphold the structure of the markets). Indeed in certain cases cartel members may make no profit at all (e.g. a cartel that controls the awarding of contracts, i.e. a contract for building is awarded to one bidder [incl. cartel profits] while the others go away empty handed). In all cases the presumed profit will be take into account in determining the basic amount of the fine, in the sense of a minimum profit (Article 3). However, in cases where the competition authorities are able to estimate the profit of the undertaking and this is shown to be particularly high, this will be considered an aggravating circumstance in the calculation of the fine. In each case, the fine should be increased so that it exceeds the profit obtained unlawfully as a result of the infringement.

lit. c

Refuses to co-operate with the authorities or otherwise attempts to obstruct the investigation constitute an aggravating circumstance which will be taken into account in the calculation of the amount of the sanction. As a particularly serious attempt to obstruct the investigation is considered the fact of destroying exhibits.

Paragraph 2

Paragraph 2 defines (in line with the international standard) particularly aggravating circumstances in the case of anti-competitive agreements as follows.

Lit. a

An undertaking that plays an instigating or leading role in a price-fixing cartel for example (Article 5 paragraph 3 ACART) should be subject to higher penalties.

Lit. b

Retaliatory measures are used to maintain and defend unlawful practices. Undertakings with a dominant position in the market can use the threat of retaliatory measures to force other cartel members to abide by agreements or to prevent them from leaving the cartel (cf. Article 5 paragraph 3 ACART). The same is true with distribution systems, e.g. when dealers are forced through delivery boycotts not to make parallel imports, or to respect unlawful retail price maintenance agreements (cf. Article 5 paragraph 4 ACART).

Article 6: Attenuating Circumstances

Article 6 deals with attenuating circumstances, but not in an exhaustive way. The following point worth making in this context:

An undertaking's decision to cooperate with the authorities in the course of an investigation is purposely not taken into account at the time of calculating the fines, but only in the context of the leniency provisions (Articles 8 and 12 etc.). This approach makes it possible to ensure that procedures will be correctly followed (i.e. in two stages) and that the competition authorities make a fundamental distinction between the calculation of fines and the leniency provisions. This way of proceeding is designed to ensure that the law is applied in a proper, transparent and comprehensible manner.

Paragraph 1

Above all it is an undertaking's decision to terminate its participation in anti-competitive practices, after the first intervention of the Secretariat, that will work in its favour. Indeed such voluntary and immediate cessation of an infringement of the ACART, and in particular a member's departure from an unlawful cartel, has the immediate effect of promoting competition and should be rewarded in an appropriate manner.

Paragraph 2

Both of these attenuating circumstances also conform to the international standard.

Article 7: Maximum Fine

This norm states clearly that the amount of the fine must under no circumstances exceed the maximum amount given in Article 49a paragraph 1 ACART.

Section 3: Total Immunity from Fines

Article 8: Requirements

Paragraph 1

The Competition Commission can grant an undertaking total immunity from fines under the terms stipulated in lit. a and b. In both cases (as in the EU leniency guidelines[5]) total immunity from fines is only granted to the first undertaking that either acknowledges an unlawful agreement and its own participation in such an agreement in the prescribed manner or that submits evidence that is decisive to the competition authorities in their investigation.

Lit. a

An undertaking provides the competition authorities with sufficiently substantiated information to constitute the basis (Article 27 ACART) for proving the existence of unlawful restraint of competition, and is the first member of the cartel to do so. It is through this kind of voluntary notifying that the competition authorities are made aware of an unlawful agreement which until then had completely escaped their attention. Such information should enable the competition authorities to take action, e.g. organising house searches.

Under no circumstances will unsupported assertions of a general nature be sufficient for an undertaking to benefit from total immunity from fines. If the information provided to the competition authorities serves merely for the opening of a preliminary investigation (Article 26 ACART), there can be no question of total immunity from fines. Such information can, however, be taken into consideration in the context of a partial reduction of fines (Article 12 etc.).

[5] Notice on immunity from fines and the reduction of fines, Official Journal, C 45/3 of 19.02.2002; "EU leniency guidelines".

Lit. b

The voluntary submission of conclusive evidence will be rewarded with immunity from fines regardless of the stage of the proceedings if the requirements of paragraph 4 are met. This serves to counter the risk that proceedings opened by the competition authorities themselves (i.e. without any prior notification) become blocked or rendered too difficult for lack of evidence.

Paragraph 2

Total immunity from fines also depends on the fulfilment of four additional conditions:

Lit. a

In the case of undertakings that have forced other undertakings to participate in unlawful agreements notified to the authorities, or who were principal offenders or instigators, full immunity from fines can be ruled out. As parliamentary discussions of the new Article 49a paragraph 2 ACART made it clear that (in Switzerland) instigators or principal offenders must not be granted exemption from fines, there are more instances of exclusion from the privilege of immunity from fines in Switzerland than in the EU. The EU guidelines only cite coercion against other undertakings as grounds for such an exclusion.

Lit. b

As a rule, the undertaking must submit and make available to the competition authorities all evidence in its purview *without being called upon to do so* (possible exceptions may be discussed with the authorities). Specifically:

a) The following in particular are considered to come within the undertaking's sphere of influence: employees and bodies for possible questioning, as well as documents and other evidence to be found on company premises or at the domicile of employees and organs.

b) An undertaking may lose its claim to full immunity from fines if, for example, it staggers the presentation of its evidence according to the stage of the proceedings for tactical reasons.

Lit. c

The obligation to co-operate with the competition authorities extends beyond the general obligation to cooperate in administrative procedures (e.g. Article 40 ACART). The undertaking must cooperate fully with the authorities for the duration of the proceedings. In particular, the undertaking will forfeit the con-

ditionally granted immunity from fines (Article 9 paragraph 3 lit. a) if it retracts the confession made in the notification it submitted or if its cooperation with the competition authorities is insufficient for other reasons.

Lit. d

On principle, an undertaking that wishes to benefit from total immunity from fines must end its involvement in dealings contrary to cartel law as soon as it submits evidence of the infringement. In special cases, however, it may be appropriate for the undertaking to stops its involvement only when requested to do so by the competition authorities, as to do otherwise might endanger the progress of the proceedings (investigative measures such as house searches on other members of the cartel).

Paragraph 3

There can be no question of total immunity from fines under paragraph 1 lit. a, if the competition authorities already possess sufficient information to begin a preliminary investigation (Article 26 ACART) or if they have already begun such an investigation. This is to ensure that there will always be an incentive to submit a notification without delay in cases of cartel law infringement. An undertaking should not be allowed to "wait and see" if the competition authorities – e.g. following monitoring of the market (Article 45 ACART) – themselves launch a preliminary investigation before providing information that would make it possible to begin an investigation (Article 27 ACART).

Total immunity under paragraph 1 lit. b is still possible in such cases, as long as the relevant conditions have been met and in particular as long as no other undertaking has already set the procedure in motion through prior submission of a notification (paragraph 1 lit. a).

Paragraph 4

This provision derives from the concept developed in the foregoing paragraphs:

Lit. a

Immunity from fines can only be granted to a single undertaking that meets either the criteria of paragraph 1 lit. a or lit. b. For if immunity were granted to both an undertaking which the meets the criterion of Article 27 ACART, as well as to an undertaking which provides evidence under paragraph 1 lit. b qualifying it for total immunity from fines this would impair the “competition for leniency“. The undertakings would have a far greater opportunity to wait and see whether or not the cartel was even going to be uncovered following the

first submission of a notification by one of its members in order to then also take advantage of total immunity, or possibly by staggering the submission of evidence. The leniency provisions would thereby become predictable and would lose their destabilising effect on cartels. Even so the contribution of an undertaking which meets one of the conditions under paragraph 1 lit. a and b, but which due to lack of priority in the timing does not qualify for total immunity can lead to a reduction of the fine in the context of leniency for cooperation (Article 12-14).

Lit. b

The second condition (i.e. if before obtaining this evidence the competition authorities would not have been in a position to prove the anti-competitive practices in question) as grounds for immunity under lit. b are clear. It is only as a result of the evidence submitted that sufficient proof of anti-competitive practices can be presented.

Article 9: Form and Content of the Self Notification

Paragraph 1

The notification must contain essential information on conditions in the market affected by the unlawful agreement, and the elements required for launching an investigation (Article 27 ACART) or decisive evidence (Article 8 paragraph 1 lit. a and b). In general, the submission should include documents identifying the undertakings involved, the persons participating in the cartel and their places of residence, at the same time giving particulars concerning the nature, time period, duration and the territory covered by the infringement, the nature of the evidence available as well as information on the dates of meetings and contacts. The competition authorities may at any time request the submission of additional relevant documents and information (Article 8 paragraph 2 lit. b/c).

In exceptional cases the notification may also take the form of verbal statement. In such cases efforts must be made to ensure that the person submitting the notification is able to collaborate with the competition authorities, and without having to fear that he may eventually be obliged to produce the documents he has supplied to the Swiss competition authorities in relation to a foreign procedure, civil or otherwise (and concerning the same ACART infringement procedure).

Paragraph 2

An undertaking may have an interest in knowing its “chances of success” in being granted lenient treatment before deciding whether or not to submit a full notification on its actions. The undertaking may for this purpose in a prior stage submit information in an anonymous form. The experience of other countries shows that undertakings often avail themselves of legal representation to ensure their anonymity. An anonymous notification must satisfy certain requirements, in particular it must allow a proper assessment to be made in the sense of Article 9 paragraph 3 lit. a.

Paragraph 3

The time sequence ('Marker') for examination of the various notifications submitted will be determined on the basis of the (written) acknowledgment of receipt of the notifications, with an indication of the time it was received (Article 10). Only the first (legally sufficient) undertaking to submit a notification can be granted total immunity from fines.

Lit. a

The Secretariat, in agreement with a member of the presiding body, will inform the notification submitting undertaking whether or not total immunity can be granted in accordance with the terms of Article 8 paragraph 2. This decision will be communicated as quickly as the complexity of the particular case allows. In doing so, the enterprise receives at an early stage of the procedure the insurance to be granted total immunity. Indeed, the Competition Commission can deviate from the communication made by the Secretariat only under certain circumstances (cf. Art. 11 para. 2).

Lit. b

In exceptional cases additional information can be entered in the record (cf. Article 9 paragraph 1, 2nd item).

Lit. c

Following receipt of an anonymous notification the Secretariat proceeds in accordance with lit. a and b. For total immunity from fines to be possible, the undertaking must, at the request of the Secretariat, reveal its identity and complete the information provided (cf. Article 8 paragraph 2 lit. b/c). From the time that a total immunity from fines is granted in principle, the undertaking’s interest in maintaining its anonymity vis-à-vis the authorities is deemed to be void.

Article 10: Procedure in the event of more than one Notification

Total immunity from fines can only be granted to a single undertaking. Should a second undertaking submit a notification but not qualify for total immunity, the timing of its submission plays a decisive role in the calculation of the fine in accordance with Article 12 (reduction of fines).

Article 11: Decision on Total Immunity from Fines

Paragraph 1

The decision on total immunity from fines is made in accordance with Article 30 paragraph 1 ACART. At the request of the Secretariat, the Competition Commission (in addition to determining the infringement of cartel law) issues a decision on the granting of immunity from fines. Under Article 29 ACART, it is also possible for the Parties and the Secretariat to reach an agreement on the fine, which is then approved by the Competition Commission.

Paragraph 2

The Competition Commission can only deviate from a communication from the Secretariat pursuant to Art. 9 para 3 lit. a only if it has later on become aware of additional circumstances that oppose the waiver of sanctions. Such circumstances may for instance be unsatisfactory co-operation during the procedure or the discovery by the Competition Commission during the procedure that the enterprise concerned was in fact the instigator or the principle actor of the infringement.

Section 4: Reduction of the fine

Article 12: Requirements

Paragraph 1

On principle, an undertaking that wishes to benefit from total immunity from fines must end its involvement in dealings contrary to cartel law as soon as it submits evidence of the infringement. In special cases, however, it may be appropriate for the undertaking to stops its involvement only when requested to do so by the competition authorities, as to do otherwise might endanger the progress of the proceedings (cf. Article 8 paragraph 2 lit. d).

Paragraph 2

If an undertaking cooperates with the competition authorities voluntarily and to a greater extent than required by law, the fine can *depending on the extent to which it contributes to the success of the procedure,* be reduced by up to 50 per cent. Unlike for total immunity, partial immunity can be granted several times. Voluntary cooperation, and to a greater extent than required by

law, should not only make it possible to bring to light evidence that otherwise would have remained undiscovered, but should also help to reduce the investigative costs of the Secretariat.

Article 13: Form and Content of Cooperation

Paragraph 1

The form and content of the offer to co-operate with the competition authorities must meet the requirements of Article 9 paragraph 1. Furthermore, the undertaking must cooperate with the competition authorities in the sense of Article 8 paragraph 2 lit. b throughout the proceedings.

Paragraph 2

The Secretariat of the Competition Commission proceeds on the basis of Article 9 paragraph 3. Unless otherwise instructed, the undertaking will be reminded that it must immediately end its involvement in practices that violate cartel law.

Article 14: Decision on the Reduction

Paragraph 1

The Competition Commission makes the final decision on the reduction of fines; it is not necessary to bring forward notification as is the case in the submission of notifications. A final evaluation of the contribution the undertaking has made to the success of the proceedings may be made as part of the final decision.

Paragraph 2

If the evidence presented reveals that the duration of the anti-competitive practices of the cooperating undertaking was longer than previously indicated and the basic amount of the fine must therefore be increased (Article 4), the Competition Commission will not take into account this additional period and will not proceed with any increase in the basic amount of the fine as determined in accordance with the above-mentioned provisions. The appeal of co-operation with the competition authorities would be diminished if the undertaking were able to obtain a reduction of the fine by means of the leniency provisions, yet at the same time had to realise that cooperation might eventually lead to a sizeable increase in the amount of the fine.

Section 5: Notifying Procedure

This section defines the procedure for notifying in accordance with Article 49a paragraph 3 lit. a ACART. According to this provision the application of a fine is dispensed with under Article 49a paragraph 1 ACART if the undertaking notifications the restraints of competition before their effects take hold. If the undertaking is informed of the opening of proceedings under Articles 26 to 30 ACART within five months of the notification's submission and subsequently continues to act in restraint of competition, application of the fine is not dispensed with.

Article 15: Notification of a possible unlawful Restraint of Competition

The notifying procedure (with the possible effect of immunity from fines) may only be sent in motion if the notified restraint of competition has not yet taken effect. This notification can be made by the company itself as well as by an agent having quality to represent the company (e.g. an association), insofar as the notified restriction has not taken effect yet. If on the other hand the restraint of trade has already been implemented, the mere fact that it has been notified will not be sufficient to qualify an undertaking for immunity from fines (Art. 49 a para. 1 ACART).

If the restraint of competition is implemented after the notification has been made it may then only become the subject of a fine if the undertaking has duly been notified of the opening of a procedure within five months and continues with the restraint of trade.

The notification has to be made in an official language. In addition, it is possible, in analogous to Art. 11 para. 4 of the Ordinance on merger control, to provide annexes in English.

Article 16: Forms and Explanations

The government's Message on the amendment of the Cartel Act of 7 November 2001 called for the creation of a notification form similar to that for the notification of company mergers as a way of simplifying the notification procedure (cf. BBl 2001, 2039). The requirements for this form will be those of Article 49a paragraph 3 lit. a ACART and should thus make the notification of practices that restrain trade easier for the undertaking. It should at the same time ensure that the notification contains essential information on which the competition authorities can base their decision of whether or not to open a procedure. The notification form will be drawn up in such a way as to limit as much as possible the cost to the notifying undertaking.

Article 17: Simplified Notification

The positive experiences obtained with the so-called simplified notification in accordance with Article 12 of the Merger Control Ordinance (SR 251.4) are another reason for the present notifying process. A simplified notification may be considered if the competition authorities are already familiar with the markets concerned due to earlier decisions or if it has been established in an earlier procedure related to cartel law that a certain undertaking has a dominant position in a given market (Article 4 para. 2 ACART).

Article 18: Confirmation of Receipt of the Notification

This norm corresponds to Articles 14 and 20 of the Merger Control Ordinance. The five month deadline begins the day after receipt of the notification.

The competition authorities makes their assessment only in relation to the facts as notified. If no objection is lodged (Article 19) before the deadline, immunity from fines takes effect only in relation to the notified facts, which are probably incomplete. The exemption does not apply to facts of the case which for whatever reason were not included in the notification.

Article 19: Objection procedure

Article 49 a paragraph 3 lit. a ACART gives the competition authorities up to five months following receipt of the notification to decide whether or not to open a procedure in accordance with Articles 26-30 ACART concerning a possible restraint of trade.

a) This deadline is the maximum that can be allowed. Depending on their workload the authorities will notify their decision to the notifying undertaking prior to the expiry of the deadline.

b) Following receipt of a notification of a decision not to open proceedings (Article 26/27 ACART) the notifying undertaking may carry out the practices it notified without risk of a direct fine. However this applies only to practices that were notified.

c) While notification by the Secretariat within the prescribed period that no procedure is to be opened (lit. b), or a lack of notification within that period, does exempt the undertaking from any fine under Article 49a paragraph 1 ACART, it has no bearing on the admissibility or otherwise of the practices notified. The authorities are free to investigate and prohibit the practices notified even after the deadline for objections has passed. However, in this case the restraint of competition notified would only be subject to an indirect fine in accordance with Article 50 ACART. The reason being that:
   The possibility to notification was introduced so as to guarantee the proper application of the law with regard to the new fines – it was not conceived for the definitive ruling as to the admissibility of certain practices. In reality, it is often not possible to make a definitive ruling on the conformity of certain practices with cartel law in the space of just five months.

d) On receipt of the notification, an undertaking can immediately proceed with the practices as notified. If, however, within the five-month period an undertaking is notified of the opening of a procedure, there are two options:

- If the undertaking continues with the restraint of trade, it remains liable to the possibility of a fine in accordance with Article 49a paragraph 1 ACART.

- If the undertaking ends its involvement in the restraint of trade, there is no risk of a direct fine (Article 49a paragraph 1 ACART).

e) For the sake of order, it is worth pointing out that in order to improve its chances of a satisfactory outcome, an undertaking can also request consultation (subject to fees) on the admissibility of a notified practice (Article 23 paragraph 2 ACART).