

- (c) the right for the customs authorities to intervene in cases of infringing goods destined for exportation from Switzerland.

Protection of undisclosed information

For an exhaustive overview of the Swiss system, the relevant texts, practice and doctrine should be consulted and complemented by the responses to questions posed by some members.

On an international level, the protection of undisclosed information is now laid down in Article 39 of the TRIPS Agreement. However, already before the entry into force of this agreement, the protection of undisclosed information has always been a major focus point of Swiss legislation and considered as an indispensable part to the Swiss legal system, in particular the protection of intellectual property. Therefore, Switzerland has known a high-level protection with regard to undisclosed information for many decades. The three conditions concerning undisclosed information laid down in Article 39.2 of the TRIPS Agreement have been developed by case-law.

There is no specific codification covering exclusively the protection of undisclosed information in Switzerland. Indeed, the provisions aimed at such protection are to be found in many different legal texts related specifically to the relevant fields where the protection is required. The provisions on the protection of undisclosed information in the Swiss legislation can be divided into three main categories:

- (a) the first category covers provisions of substantive civil law (e.g. contract law, unfair competition, protection of the personality, etc.), as well as the relevant civil remedies (injunctions, claims, damages, etc. covered by the federal and cantonal laws on civil procedure);
- (b) within the second category, the substantive administrative provisions (e.g. obligations of secrecy for civil servants) and the procedural administrative provisions (e.g. the possibility to require the confidentiality of commercial secrets within administrative proceedings) are to be found;
- (c) finally, the third category encompasses criminal sanctions; they cover in particular sanctions against criminal actions in the field of trade and commercial secrets and relating to the obligation by civil servants and certain professions (e.g. medical personnel, dentists, lawyers, the clergy) to keep information secret obtained in the context of their profession; the sanctions consist in a fine or imprisonment.

It may be noted in this context that the enforcement of substantive provisions on the protection of undisclosed information is left to the cantonal courts according to the federal system in Switzerland.

The following (non-exhaustive) list gives an overview of the main legal texts which contain provisions on the protection of undisclosed information:

- Patent Law of 25 June 1954;
- Patent Ordinance of 19 October 1977;
- Trademark Ordinance of 23 December 1992;
- Ordinance on topographies of semi-conductor products of 26 April 1993;

- Federal Law on Unfair Competition of 19 December 1986;
- Federal Law on Cartels (Antitrust Law) of 20 December 1985;
- Civil Code of 10 December 1907;
- Code of Obligations of 30 March 1911 (contract and tort laws);
- Federal Law on the Protection of Data of 19 June 1992;
- Federal Law on the Control of Prices of 20 December 1985;
- Federal Statute for Civil Servants of 30 June 1927;
- Swiss Intercantonal Regulation of 3 June 1971 concerning the Control of Medicinal Products;
- Different laws regulating the authorization of plant protection products;
- Criminal Code of 21 December 1937;
- Federal Law on Administrative Procedure of 20 December 1968;
- Federal Law on Civil Procedure of 4 December 1947.

The cantonal laws on civil and criminal procedures contain provisions on the protection of trade and commercial secrets as well.

Antitrust Law

The Federal Act on Cartels and Other Restraints of Competition (Act) was adopted on 6 October 1995 and entered into force on 1 July 1996. The new Act marks a turn from a more cartel friendly Swiss antitrust legislation to a clearly competition minded antitrust policy.

The major characteristics of the Swiss Antitrust Act cant be summarized as follows:

Scope

The Act applies to private or public enterprises that are party to cartels or to other agreements affecting competition, have market power or take part in concentrations of enterprises. It applies to restrictive practices whose effects are felt in Switzerland, even if they originate in another country. It does not apply to effects on competitions that result exclusively from laws governing intellectual property.

Substantive Provisions

Agreements Restraining Competition

Agreements that significantly affect competition in a specific market are forbidden. If such agreements do not completely prevent competition, they may, however, be permitted by the competition authority if they increase economic efficiency. The Act, in particular, mentions agreements which allow the parties to decrease production or distribution costs, to improve the quality of products, to

intensify research and development or to economize resources. Under the Act it therefore will still be possible to enter into production and research joint ventures as well as into exclusive licence or distributorship agreements. The Federal Council may issue ordinances defining which agreements generally benefit from the exceptions.

Furthermore, the Act quotes several agreements among actual or potential competitors that are presumed to lead to the elimination of effective competition and that are therefore forbidden. Such agreements are price fixing agreements, agreements restricting the quantities of goods or services to be produced, bought or supplied, or agreements allocating markets geographically or according to trading partners.

Finally, the Federal Council may allow agreements which prevent competition or restrain competition without increasing economic efficiency if such agreements are necessary to protect overriding public interests.

Dominating Enterprises

Practices of enterprises having a dominant position are deemed unlawful when such enterprises, through the abuse of their position, prevent other enterprises from entering or competing in the market or when they injure trading partners. Such practices are, e.g., refusal to deal, discrimination between trading partners with regard to prices or other conditions of trade, or the imposition of unfair prices or other unfair conditions of trade.

Unlawful practices of dominating enterprises may however be allowed by the Federal Council in order to protect overriding public interests.

Merger Control

The Act introduces merger control rules similar to those of the EU or to Member States such as Germany. The Competition Commission must be notified of concentrations of enterprises before they are carried out when, in the last accounting period prior to the concentration (a) the enterprises concerned reported joint turnover of at least Sfr. 2 billion or turnover in Switzerland of at least Sfr. 500 million, and (b) at least two of the enterprises concerned reported individual turnover in Switzerland of at least Sfr. 100 million. In addition, the Act quotes specific provisions on media enterprises, insurance companies, and banks.

The reservation of the approval by the Federal Council on grounds of overriding public interests applies also on mergers.

Procedural Provisions

Administrative Procedure

Under the Act the Secretariat of the Competition Commission may conduct preliminary investigations on its own initiative, at the request of enterprises concerned or on information received from third parties. If signs of an unlawful restraint of competition exist, the Secretariat opens an investigation, with the consent of a member of the commission's presiding body. It has to open an investigation in all events if asked to do so by the commission or by the Federal Department of Public Economy. After the termination of an investigation the Commission, on a proposal from the Secretariat, takes its decision on measures to be taken or non approval of amicable settlement. To the procedure before the commission the Federal act on administrative procedure applies, insofar as the Act does

not provide otherwise. Accordingly, it grants the parties full access to all documents filed and to the hearings of witness and experts, conditionally the safeguarding of manufacturing and business secrets.

Civil Procedure

A person whose ability to compete is impeded by cartelistic agreements or by a dominant enterprise may file a law suit in civil courts and request (a) removal or cessation of the obstacle, (b) damages and reparations in accordance with the Swiss code of obligations, or remittance of illicitly earned profits in accordance with the provision on conducting business without a mandate.

Administrative and Criminal Sanctions and Penalties

The Act does not provide for criminal sanctions or administrative penalties against parties which engage in anti-competitive actions. An infringement of an amicable settlement or an enforceable order, however, may be punished based on administrative penalty provisions (fine which may amount of up to three times the profit derived from such infraction or up to 10 percent of the turnover the enterprise concerned has achieved in Switzerland during the preceding year) and based on criminal penalty provisions (fine up to Sfr. 100'000.-). Furthermore, as an administrative penalty, a fine up to Sfr. 1 million may be levied if the parties do not notify the competition authority of a merger which is governed by the merger control rules of the Act.

In addition, the Act authorizes the Competition Commission to observe the development of the market and to give its opinion on planned acts and decrees. The Competition Commission may address its recommendation to federal or sub-federal authorities.

II. REPLY TO THE GENERAL QUESTION ON PRIORITY RIGHTS³

Does your country recognize a right of priority on the basis of an earlier patent application filed in any other WTO Member by a national of a WTO Member?

Yes.

From the date on which Switzerland ratified the WTO Agreement, i.e. 1 July 1995, the regime applicable in Switzerland with respect to priority rights under the Paris Convention was extended to all WTO Members, including those availing themselves of a transitional period provided for in the TRIPS Agreement. Attention is drawn to the fact that Switzerland and the Principality of Liechtenstein form a unitary territory for the purposes of patent protection according to the Treaty on the Protection of Patents of 1978.

III. REPLIES TO QUESTIONS POSED BY THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

Preliminary Remarks

Primacy of international law

The principle according to which "The law of nations is part of the law of the land" is also accepted in Switzerland as a non-written (non-codified) principle. It is the unanimous opinion of the courts and the doctrine that this principle applies not only with regard to international consuetudinary

³At the meeting of the TRIPS Council of 27 February 1997, Members agreed to respond to this question in the context of the present review (document IP/C/M/12, paragraph 18).

law but also with regard to international treaties. Therefore there is no need to transpose word by word international treaties which are duly ratified by Switzerland to the Swiss national law. In case of contradiction, the provisions of the international treaty will prevail. It is for that reason that the Swiss national legislation must be interpreted in the light of international law ("Frigerio decision" of the Swiss Federal Tribunal [BGE 94 [1968] I 669, 672]). According to this non-written constitutional principle, the courts are bound to respect the relevant international obligation when applying a provision of national law to an individual case.

General remarks on the relations between Liechtenstein and Switzerland

Attention is drawn to the fact that the Principality of Liechtenstein and Switzerland have, within the framework of their Customs Union Treaty of 1923, concluded in 1978 a Treaty on the Protection of Patents (Patent Treaty), which has been complemented in 1994⁴. Under the Patent Treaty, both countries constitute a unitary territory of protection. The applicable law for that unitary territory is the Patent Law of Switzerland. Patents can be granted, transmitted, cancelled, or lapse only for the whole territory of protection. Both countries are parties to the European Patent Convention of 1973 and to the Patent Cooperation Treaty of 1970. Under these treaties, they can be designated together only.

1. Does Article 40(b) of the Swiss Patent Act provide that an authorization for other use without authorization of the right holder according to Article 31(a) of the TRIPS Agreement shall be considered on its individual merits?

Yes.

In conformity with the Swiss legislative technique and tradition inherited from Eugen Huber, author of the Swiss Civil Code (1907)⁵, legal texts must not be encumbered with provisions reflecting principles of law that are self-evident and well anchored in the international law as well as in the Swiss constitutional and judicial systems. Exceptions are only made when, for the sake of clarity and understanding by a layman, it is deemed necessary to reflect, wholly or partially, the provisions of a treaty. Moreover, whenever it is not possible to find in the letter and spirit of a Swiss national law a solution, the judicial authorities will have to decide in accordance with the consuetudinary law, or in the absence thereof, in accordance with the rule they would set up if they were to act as the legislator (Article 1 paragraph 2 Swiss Civil Code). At this occasion, the judicial authorities have to observe the international treaties ratified by Switzerland (see above, preliminary remarks).

"Immaterialgüterrecht" (rights on intangible property) pertain to the domain of ownership or property. *The guarantee of ownership is one of the fundamental constitutional principles* (Article 22ter of the Swiss Federal Constitution). It is unanimously respected. An ownership right may be affected only if there is a clear and sufficient legal basis, if the public interest justifies it sufficiently and if the measure intended to be taken in the individual case respects the principle of proportionality. In assessing the proportionality requirement, the judicial authorities - whether at the cantonal or federal levels - *must* weigh the purpose, the means and the effects of the measure which is requested to be ordered. They have therefore the obligation - for each case (*in concreto*) - to examine all the interests concerned

⁴The Swiss delegation added that the Patent Treaty had been notified to the TRIPS Council by Switzerland and Liechtenstein as reflected in documents IP/N/1/CHE/1 (paragraph 4 of the Annex to the notification by Switzerland) and IP/N/1/LIE/1. The texts of the bilateral agreements mentioned in the Preliminary Remarks were also transmitted by Switzerland to the TRIPS Council together with notification IP/N/4/CHE/1 and by Liechtenstein with notification IP/N/4/LIE/1.

⁵By way of explanation, Switzerland added that, according to this technique, as a law-making rule, articles should not contain more than a certain number of paragraphs, each paragraph being normally limited to one sentence.

and weigh them against each other; in TRIPS words, they have to consider the "individual merits of a case". Article 40b paragraph (7) of the Swiss Patent Law provides that the judge decides on the "grant"; it is construed as covering the requirement of Article 31(a) of the TRIPS Agreement.

2. Does Article 40(b) paragraph 1 of the Swiss Patent Act imply that, as in situations of national emergency or circumstances of extreme urgency according to Article 31(b) of the TRIPS Agreement, the right holder shall be notified as soon as reasonably practicable?

Yes.

In Switzerland, the judicial authorities are competent to decide on "other uses without authorization of the right holder". Therefore, even if, in the case of a national emergency, the obligation to make efforts to obtain first a contractual licence from the right holder on reasonable commercial terms may be waived, the proposed compulsory licensee will have to make the request to the judicial authorities. According to the principles of procedural law in Switzerland, the right holder must, however, be heard before the judge decides on the grant of such use. This is both a general principle of law and a non-written constitutional principle deriving from Article 4 paragraph 1 of the Swiss Federal Constitution. Furthermore, the right holder will receive a copy of the judicial decision immediately after it has been taken. Therefore, the right holder will be heard before the decision and be informed after it has been taken.

3. Does Article 36 paragraph 3 of the Swiss Patent Act in respect of cross-licences in connection with the exploitation of a patent which cannot be exploited without infringing another patent give the owner of the first patent, according to Article 31(l)(ii) of the TRIPS Agreement, a right for a cross-licence "on reasonable terms" to use the invention claimed in the second patent?

Yes.

Article 40b of the Swiss Patent Law is also applicable to Article 36 of the Swiss Patent Law. Therefore, the right to a cross-licence must be accorded on reasonable terms. See also response to question 1.

4. Article 34.1(a) and (b) of the TRIPS Agreement provides that in at least one of the following circumstances any identical product produced without the consent of the patent owner shall, in the absence of proof to the contrary, be deemed to have been obtained by the patent process: either if the product obtained by the patent process is new, or, if there is a substantial likelihood that the identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used. Does Article 67 paragraph 2 of the Swiss Patent Act provide the change in the onus of proof as this is stated in Article 34.1 TRIPS?

Yes.

Under Article 67 paragraph 1 of the Swiss Patent Law, if the invention concerns a process for the manufacture of a *new* product, every product of the same composition is deemed to have been obtained by the patented process until proof to the contrary has been adduced. Article 67 paragraph 1 of the Swiss Patent Law is also applicable by analogy in the case of a process for the manufacture of a *known* product, if the patent owner shows *prima facie* evidence of infringement of the patent.