

Vertical Agreements

in 35 jurisdictions worldwide

2014

Contributing editor: Stephen Kinsella OBE



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Getting the Deal Through is delighted to publish the eighth edition of *Vertical Agreements*, a volume in our series of annual reports that provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 35 jurisdictions featured. New jurisdictions this year include Indonesia, Norway, Russia and Sweden. There is also a new chapter on most-favoured-nation clauses.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editor Stephen Kinsella OBE of Sidley Austin LLP for his continued assistance with this volume.

Getting the Deal Through

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Antitrust law

- 1** What are the legal sources that set out the antitrust law applicable to vertical restraints?

The relevant legislation in Switzerland is the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 (Cartel Act, CartA). In addition, the Swiss Competition Commission (ComCo) issued a new notice regarding the competition law treatment of vertical agreements of 28 June 2010, which entered into force on 1 August 2010 (Verticals Notice, VN), replacing a previous notice of 2 July 2007. Legal sources in the area of antitrust law are available on the ComCo's website (www.weko.admin.ch) in the official languages of German, French and Italian; some of them are also available in an unofficial English translation (without legal force).

Types of vertical restraint

- 2** List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

CartA, article 5, distinguishes three types of unlawful agreements in terms of the intensity of the restraint of competition:

- agreements that do not significantly affect competition are lawful;
- agreements that significantly affect competition are lawful if they can be justified on grounds of economic efficiency and unlawful if they cannot be so justified; and
- agreements that eliminate effective competition are unlawful.

CartA, article 5(4) defines two types of vertical agreements presumed to lead to the elimination of effective competition. Accordingly, agreements between undertakings on different market levels regarding minimum or fixed prices as well as clauses in distribution agreements regarding the allocation of territories, provided distributors from other territories are prohibited from sales into these territories, are presumed to eliminate effective competition. The rules in CartA, article 5(4) are widely held to declare unlawful prohibitions of passive sales into exclusive territories (ie, absolute territorial protection).

The concept of vertical restraints itself is defined in the Verticals Notice, article 1. Vertical agreements include binding or non-binding agreements and concerted practices between two or more enterprises at different levels of the market which concern the commercial terms on which the relevant enterprises may purchase, sell or distribute goods or services.

Legal objective

- 3** Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

The main objective pursued by the law on vertical restraints is the protection of competition. However, there also is a Notice of 19

December 2005 regarding agreements with limited market effects meant to provide a safe harbour for small and medium-sized enterprises (SME Notice). The Verticals Notice takes precedence over the SME Notice (VN, article 9(2)).

Responsible authorities

- 4** Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

In Switzerland, only federal administrative bodies have the power to implement the CartA, namely, the ComCo and its Secretariat. The main administrative body enforcing the CartA is the ComCo. It is independent of the federal government (CartA, article 19(1)). The ComCo is the sole administrative body with power to issue decisions prohibiting anti-competitive vertical restraints and to impose fines (CartA, article 53(1)). Decisions of the ComCo can be appealed to the Federal Administrative Court and to the Swiss Federal Court consecutively.

The Secretariat of the ComCo conducts investigations and preliminary investigations and prepares the ComCo's decisions (CartA, article 23(1)). The Secretariat has the power to open investigations with the consent of a member of the ComCo's presiding body (CartA, article 27(1)).

In addition, every civil court can decide about the legality of anti-competitive vertical restraints if parties raise this issue in a civil litigation.

Jurisdiction

- 5** What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

The Swiss antitrust law applies to vertical restraints whose effects are felt in Switzerland, even if they originate in another country (CartA, article 2(2)).

In a decision dated 11 June 2011, the ComCo fined two companies active in Switzerland for obstacles to online sales. The ComCo concluded that these distributors must be allowed to use the internet to sell products. Thus prohibitions of online sales are considered by the ComCo restrictions of passive selling.

This is the first precedent regarding vertical restraints where the law has been applied in a pure internet context.

At the end of 2012, the ComCo opened an investigation into several online hotel reservation companies. The ComCo has to examine, inter alia, 'best price' clauses. The investigation is ongoing.

In November 2009, the ComCo fined two companies, one of which has its headquarters in Austria, thus applying the law

extraterritorially. The ComCo considered that restrictions of passive sales in a licence agreement infringed CartA, article 5(4). In this decision regarding the prohibition of parallel imports of toothpaste, the ComCo held that the presumption of an elimination of effective competition by an agreement on absolute territorial protection applies not only in distribution agreements (as the wording of CartA, article 5(4) would seem to imply), but also if such a clause is contained in a licence agreement. In December 2013, the Federal Administrative Court confirmed this decision. The decision has not yet become final and binding and is under appeal by both companies.

In May 2012, the ComCo fined BMW AG, with headquarters in Munich, 156 million Swiss francs for impeding parallel imports into Switzerland. According to the decision, a clause in BMW Group's contracts with authorised dealers in the EEA prohibits them from selling BMW and Mini vehicles to customers outside the EEA (to which Switzerland does not belong). The investigation was opened in autumn 2010 after the ComCo received various complaints by Swiss customers who had tried unsuccessfully to purchase a BMW or Mini vehicle from a dealer outside Switzerland. The decision is under appeal.

Agreements concluded by public entities

- 6** To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

Swiss antitrust law equally applies to vertical restraints in agreements concluded by public or state-owned entities (CartA, article 2(1)). However, to the extent that particular provisions establish an official market or price system or that provisions entrust certain enterprises with the performance of public-interest tasks, by granting them special rights, such provisions take precedence over the provisions of the CartA (CartA, article 3(1)).

Sector-specific rules

- 7** Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

In the motor vehicle sector, there is a special Notice on the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade of 21 October 2002, as well as explanatory comments of the ComCo thereto, which were amended in the summer of 2010. This notice takes precedence over the Verticals Notice (VN, section 9(1)).

General exceptions

- 8** Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

There are no general exceptions from antitrust law for certain types of vertical restraints as such (regarding the general applicability of antitrust law in the area of intellectual property rights, see question 14). However, the ComCo regards vertical agreements other than those explicitly listed in the Verticals Notice, sections 10(1) and 12 usually as non-significant restrictions of competition, provided the market share of all the enterprises involved does not exceed a threshold of 15 per cent on any of the relevant markets (VN, section 13(1)). As mentioned in question 3, the Verticals Notice takes precedence over the SME Notice, which generally applies to agreements with limited market effects (VN, section 9(2)).

Agreements

- 9** Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

The term 'agreement' is defined by CartA, article 4(1). It comprises binding or non-binding agreements and concerted practices between

enterprises of the same or different levels of the market, the purpose or effect of which is to restrain competition.

- 10** In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

Agreements affecting competition are defined as binding or non-binding agreements and concerted practices between undertakings that have as their object or effect a restraint of competition (CartA, article 4(1)). A formal written agreement is not required; an informal or unwritten tacit understanding is sufficient to engage the relevant rules. However, it is necessary that parties knowingly and wilfully cooperate; that is, a 'meeting of minds' must be established. In return, mere parallel conduct is not sufficient.

In a November 2009 decision, the ComCo held that non-binding public price recommendations for specific non-reimbursable pharmaceutical products (Viagra, Levitra, Cialis) to constitute vertical price-fixing in accordance with CartA, article 5(4). The decision was set aside on appeal by the Federal Administrative Court. In December 2013, the court approved the appeals fixed by the manufacturers on the basis that the CartA does not apply owing to regulatory and factual impediments to price competition. This decision has been appealed to the Federal Supreme Court by the Swiss Federal Department of Economic Affairs, Education and Research (EAER) (see 'Update and trends').

Parent and related-company agreements

- 11** In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Antitrust law applies to agreements between a parent and a related company as long as the related company does not belong to the same group. If a parent company effectively controls its affiliated companies, for example, by the majority of capital or of voting shares, the whole group as such is regarded as one independent economic entity. The CartA does not apply to group-internal relationships (group privilege).

Agent–principal agreements

- 12** In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

In Swiss antitrust law, there are no special provisions regarding agency agreements. Although there are no judicial precedents, it is likely that the Swiss authorities would apply similar principles as in EU competition law.

- 13** Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

As mentioned (see question 12), there are no special provisions or judicial precedents regarding agency agreements in Swiss antitrust law. It is likely that the Swiss authorities would apply similar principles as in EU competition law as to what constitutes an agent–principal relationship for these purposes.

Intellectual property rights

- 14** Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Swiss antitrust law does not apply to effects on competition that result exclusively from laws governing intellectual property (CartA, article 3(2) first sentence). However, this exception does not apply to import restrictions based on IPRs (CartA, article 3(2) second sentence). The exact scope of this provision is unclear, and there are no precedents on its application yet. In a landmark case prior to the enactment of CartA, article 3(2) second sentence, the Federal Supreme Court had held in 1999 that antitrust law – in particular the prohibition of abuse of a dominant position – may apply to a ban on parallel imports despite the principle of national exhaustion under patent law (as it was in force then). Section 8(4) of the Verticals Notice explicitly states that the notice does not apply to vertical agreements containing provisions which relate to the assignment or use of IPRs, provided that those provisions constitute the primary object of such agreements and provided that they are not directly related to the use, sale or resale of goods or services by the buyer or its customers.

Analytical framework for assessment

- 15** Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

In Switzerland, two types of vertical restraints are presumed to eliminate effective competition and may be punished with first time infringement fines: agreements on fixed or minimum resale prices and agreements in distribution contracts on absolute territorial protection. These types of restrictions (see CartA, article 5(4); VN, section 10(1)) are unlawful, unless the presumption of an elimination of competition can be rebutted and, if they significantly affect competition, they can be justified on grounds of economic efficiency. Parties participating in these two types of restrictions may be sanctioned with fines if the presumption of an elimination cannot be rebutted and, in the practice of the ComCo (which has not been confirmed by the Federal Supreme Court) if the presumption of an elimination of competition can be rebutted, but the vertical restriction significantly affects competition and cannot be justified on grounds of economic efficiency.

Other vertical agreements that significantly affect competition in the market for certain goods or services are unlawful, unless they can be justified on grounds of economic efficiency (CartA, article 5(1)). Consequently, there is no rule-of-reason analysis to be undertaken but rather an efficiency test. According to CartA, article 5(2), an agreement is deemed to be justified on grounds of economic efficiency if:

- it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
- such agreement will not in any way allow the enterprises concerned to eliminate effective competition.

The list of criteria for the efficiency test in CartA, article 5(2) is exhaustive. Further justification grounds such as general political considerations, cultural aspects or public health cannot be taken into consideration within the framework of article 5(2). According to CartA, article 8, agreements affecting competition whose unlawful nature has been ascertained by the competent authority may be authorised by the Federal Council at the request of the enterprises concerned if, in exceptional cases, they are necessary in order to safeguard compelling public interests.

The conditions under which vertical agreements affecting competition are generally deemed to be justified on grounds of economic

efficiency may be determined by way of ordinances or communications (CartA, article 6(1)), for example, for agreements on research and development or on specialisation.

- 16** To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

According to the Verticals Notice, the competition authorities do take market shares, market structures and other economic factors into consideration. Vertical agreements are normally not problematic if no party to the agreements holds more than 15 per cent market share in one of the affected markets. This threshold is not applicable to vertical agreements presumed to eliminate effective competition and to certain types of agreements enumerated in Verticals Notice, section 12 (VN, section 13(1); see also questions 2, 8 and 18). The threshold is lowered to 5 per cent in case of cumulative foreclosure effects of several parallel agreements. The Verticals Notice further provides that agreements are, as a general rule, justified on grounds of economic efficiency without further investigation if the market share of each of the parties to the agreement in the relevant markets is not higher than 30 per cent. Again, this rule is not applicable to certain types of agreements enumerated in the Verticals Notice, section 12. Further, it is not applicable if the agreement has a cumulative effect together with other agreements on the same market (VN, section 16(2); see also question 18).

Whether certain types of agreements or restriction are widely used by suppliers is not a decisive criterion for assessing their legality. For example, the ComCo has held public price recommendation for three specific non-reimbursable pharmaceutical products to constitute an unlawful agreement on fixed prices, although public price recommendations are used widely across the industry.

- 17** To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

A buyer market share of 30 per cent was newly introduced in the Verticals Notice in 2010 (under the previous notice of 2 July 2007, only the supplier's market share was taken into account). A buyer market share of more than 30 per cent means that agreements are not generally considered to be justified on grounds of economic efficiency without further investigation, but that an individual assessment is required (see question 16). The market positions of other buyers is not relevant as such under the Verticals Notice, but may be taken into account in the individual assessment. The conduct of other buyers is relevant inasmuch as cumulative effects of agreements on the same market are taken into account (VN, section 16(2); see also questions 16 and 18). Whether certain types of agreements or restrictions are widely agreed to by buyers is not a decisive criterion for assessing their legality. No such decisions have been published by the ComCo so far.

Block exemption and safe harbour

- 18** Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

The Verticals Notice is meant to provide certainty to companies, but concentrates rather on the illegality than on the legality of vertical restraints under specific conditions. Like its EU counterpart, the Verticals Notice contains some sort of 'safe harbour' provision. However, the term 'safe harbour' is misleading in that the Verticals Notice expressly states that the benefit of the 'safe harbour' is only granted

'as a general rule' rather than without exception, thus depriving the 'safe harbour' of its primary role of granting certainty to the companies relying on it. Also, the provision is drafted so narrowly as to exclude from its scope the vast majority of vertical agreements that affect competition.

Formally, the 'safe harbour' works as follows: agreements containing no blacklisted practices are, generally, considered to be 'too insignificant to affect competition' (and therefore legal) if the market shares of the parties to the agreement are below 15 per cent (VN, section 13(1)) unless a cumulative effect in the market resulting from several parallel vertical agreements can be observed, in which case these market share thresholds drop to 5 per cent (VN, section 13(2)). However, if the market share of the supplier as well as the buyer does not exceed 30 per cent, as a general rule any vertical agreement is deemed to be 'justified', namely legal (VN, section 16(2)), provided that it does not contain any blacklisted practices. The latter include, *inter alia*, the direct or indirect setting of minimum or fixed prices for resale, the restriction of active or passive sales to end-users by members of a selective distribution system operating at the retail level of trade or non-compete obligations the duration of which is indefinite or exceeds five years (see the list in VN, section 12, including exceptions).

Section 16 of the Verticals Notice sets out the framework for assessing the justification of a restriction according to CartA, article 5(2). This may particularly be the case if an agreement enhances economic efficiency (for example, through a more efficient system of distribution in terms of product upgrading or improvements in manufacturing processes, or by lowering distribution costs) and the restriction of competition is necessary in order to achieve this goal.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Restricting the buyer's ability to determine its resale price by fixed or minimum prices is presumed to eliminate effective competition under Swiss antitrust law and is unlawful and can be sanctioned by imposing a fine in case of a first time infringement, unless the presumption can be rebutted (see question 15). In return, the supplier's imposing a maximum sale price or recommending a sale price will generally be permissible, provided that they do not amount to a fixed or minimum sale price as a result of pressure of, or incentives offered by, any of the parties. However, the ComCo held public price recommendations for specific non-reimbursable pharmaceutical products to be unlawful, although no pressure or incentives were established (decision currently under appeal).

In 2011, the ComCo's Secretariat, in two preliminary investigations, had the chance to assess public resale price recommendations. In a preliminary investigation of the market for hearing aids, the Secretariat came to the conclusion that there were indications for an agreement on price maintenance because a considerable number of the retailers adhered to the recommendations. In the second preliminary investigation, concerning Festool, the Secretariat held that, as a general rule, the level of adherence in itself does not necessarily suffice to establish an agreement on resale price maintenance. In general, other elements would be necessary for such a qualification. Hence, it still remains unclear whether price recommendations that are adhered to unilaterally by retailers can constitute an agreement on resale prices in Switzerland.

In 2012, the ComCo imposed a fine of 470,000 Swiss francs for retail price maintenance agreements in relation to alpine sports products. According to the authority, the supplier Altimum imposed minimum resale prices on its products' retailers, eliminating competition for its goods among sports equipment stores. The decision is under appeal (see also question 10)

20 Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

The ComCo has not considered such cases in its published decisions yet. The Verticals Notice sets out a list of grounds of economic efficiency that may in particular be claimed as justification (VN, section 16(4)), which includes protection for a limited duration of investments aimed at opening up new geographical or products markets and ensuring the uniformity and quality of the contractual products (VN, section 16(4)(a) and (b)). However, in its decision regarding public price recommendations for non-reimbursable pharmaceutical products (see questions 16 and 19), the ComCo considered these grounds of economic efficiency not to be relevant in the context of fixing of resale prices (by way of public price recommendations). In another decision regarding an agreement on resale price maintenance for gardening scissors, the ComCo held that market entry with new products could constitute a ground of economic efficiency pursuant to the predecessor provision of the Verticals Notice, section 16(4)(a), which was not applicable in the case at hand, however.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

In decisions regarding industry-wide agreements on the prices for sheet music and on book prices, the ComCo held that a bundle of vertical restraints on resale prices would amount to a horizontal agreement on prices. In its decision which held the public price recommendations for specific non-reimbursable pharmaceutical products to constitute an agreement on fixed prices (see questions 16 and 19), the ComCo also investigated horizontal collusion between the manufacturers of these products, but held that such collusion could not be corroborated; potential collusion among the buyers (ie, pharmacies and self-dispensing doctors) was not addressed in the decision.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

In its decision which held the public price recommendations for specific non-reimbursable pharmaceutical products to constitute an agreement on fixed prices (see questions 16 and 19), the ComCo addressed several potential efficiencies, in particular avoidance of the hold-up problem, the free-rider problem and the double marginalisation problem (see VN, section 16(4)(c), (d) and (e)). None of these efficiencies was recognised in the decision in question.

In its decision regarding an agreement on resale price maintenance for gardening scissors (see question 20), the ComCo very briefly considered market entry with new products and avoidance of free-riding as potential efficiencies (predecessor provisions of VN, section 16(4)(a) and (d)), but recognised neither of these efficiencies in the decision in question.

23 Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

As a general rule, agreements to fix retail prices are presumed to eliminate effective competition under Swiss antitrust law. Such vertical price-fixing is considered unlawful and can be sanctioned by imposing a fine. Buyers must in any case remain free to determine their own retail prices. There are presently no special provisions or judicial precedents concerning 'pricing relativity' in Swiss antitrust law.

- 24** Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

There are currently neither special provisions nor precedents regarding the assessment of most-favoured-customer clauses at the wholesale level (see question 25).

- 25** Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

The ComCo is at present investigating one case regarding most-favoured-nation clauses in the online environment (see question 5 concerning internet hotel booking platforms).

- 26** Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

There are currently no judicial precedents regarding buyer-side most-favoured-supplier clauses.

- 27** How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

A supplier may restrict active sales, but not passive sales, by the buyer of its products into the exclusive territory reserved to the supplier or granted by the supplier to another buyer, provided that passive sales are still possible without restriction (VN, section 12(2)(b)(i)) (ie, provided that the supplier or buyer remains able to fulfil unsolicited orders from individual customers and that distribution through the customers of the buyer is likewise not restricted) (see question 5 concerning BMW). A supplier can require a buyer to ensure that its customer does not make onward sales outside of the territory allocated to the buyer.

- 28** Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

A supplier may restrict active sales by the buyer of its products to a customer group exclusively reserved to the supplier or granted by the supplier to another buyer, provided that passive sales are still possible without restriction (VN, section 12(2)(b)(i)) (ie, provided that the supplier or buyer remains able to fulfil unsolicited orders from individual customers and that distribution through the customers of the buyer is likewise not restricted).

Members of a selective distribution system must not be restricted from actively or passively selling to end-consumers (VN, section 12(2)(c)). Suppliers must not be restricted either from selling components or spare parts to end-consumers or repair workshops (VN, section 12(2)(e)).

- 29** How is restricting the uses to which a buyer puts the contract products assessed?

A supplier may restrict the buyer's ability to sell components supplied for the purposes of incorporation to customers who would use them to manufacture rival products, namely the same type of products as those produced by the supplier (VN, section 12(2)(b)(iv)).

- 30** How is restricting the buyer's ability to generate or effect sales via the internet assessed?

In 2010 the ComCo opened a formal investigation relating to the restriction of online sales (in the area of white goods) based on the definition of 'passive sales' in the Verticals Notice. Internet sales are considered to be 'passive sales', which may not be restricted (see questions 2 and 28), except where sales efforts are specifically targeted at customers outside of an allocated territory (VN, section 3). In its decision of July 2011, the ComCo approved the amicable settlement. Further, it came to the conclusion that it is unlawful as a matter of principle to prohibit sales via online shops. Based on the ComCo's decision, online sales can be lawfully restricted only in very specific circumstances. According to the decision, the supplier may further require that the distributor who operates online distribution have at least one point of sale. It is also legal to require that the online dealer indicate the identity and the address of this point of sale. However, it is unclear based on the published decision if this concludes all legal restrictions for online sales or whether additional restrictions could also be legally imposed.

- 31** Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

There is no guidance yet with respect to distinguishing between different types of internet sales channels.

- 32** Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Restrictions on multi-brand distribution targeting brands of particular competing suppliers are deemed significant restrictions of competition (VN, section 12(2)(h)). Further, restrictions on cross-supply between authorised dealers within a selective distribution system, also when dealers at different levels of the market are involved, are deemed significant restrictions of competition (VN, section 12(2)(d)). Similarly, the restriction of active or passive sales to end-users by members of a selective distribution system operating at the retail level of trade is also regarded as a significant restriction of competition (VN, section 12(2)(c)). But authorised dealers within a selective distribution system may be restricted in their freedom to resell the relevant goods or services to unauthorised dealers (VN, section 12(2)(b)(iii)). There is no explicit requirement that the criteria for selection must be published or that their application in a specific case can be challenged. This may, however, be helpful in showing that one of the criteria for a qualitative selective distribution system is fulfilled, namely the choice of resellers based on objective criteria of a qualitative nature that are laid down uniformly and applied in a non-discriminatory manner (see question 33).

- 33** Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

The Verticals Notice stipulates three general conditions for the admissibility of qualitative selective distribution systems (VN, section 14):

- the nature of the product must necessitate a selective distribution to preserve its quality and ensure its proper use;
- resellers must be chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly and applied in a non-discriminatory manner; and
- these criteria must not go beyond what is necessary.

A selective distribution system that fulfils these conditions does not, in principle, significantly restrict competition and is permissible.

This is, however, subject to the provisos of the Verticals Notice, section 12 (see question 32).

Special rules are applicable to the motor vehicle trade (see Notice regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade, question 7).

34 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

Restrictions on active or passive sales by retailers who are members of a selective distribution system to end-consumers are regarded as significant restrictions of competition (VN, section 12(2)(c)). Likewise, the restriction of cross-supply between authorised dealers is deemed to be a significant restriction of competition (VN, section 12(2)(d)). Both need to be justified on grounds of economic efficiency. Qualitative standards for selling via the internet should be admissible if they do not go beyond what is necessary. Further, restrictions should be allowed that are directed at preventing authorised dealers from reselling to unauthorised dealers. However, up to now there has not been any decision regarding the restriction to sell via the internet, and the Verticals Notice does not specifically address the problem, apart from the general statement that internet sales are considered to be passive sales, except where sales efforts are specifically targeted to customers outside of an allocated territory (VN, section 3; see question 30).

35 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

No such decisions have been published by the ComCo so far.

36 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Yes, cumulative effects are taken into account. If several similar parallel distribution systems cover more than 30 per cent of the market, the market share threshold for significant restrictions of competition is lowered from 15 per cent to 5 per cent (see question 16).

37 Has the authority taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

The ComCo has so far not published any decisions relating to resale price maintenance policies in selective distribution systems. However, the general presumption that agreements on minimum or fixed prices eliminate effective competition and are unlawful (CartA, article 5(4) and (VN, section 10(1)(a)) is applicable to selective distribution systems as well. This includes agreements on minimum or fixed prices that are 'disguised' as price recommendations.

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

In November 2011, the ComCo held that Nikon unlawfully impeded parallel imports into Switzerland, and fined the company 12.5 million Swiss francs. According to the decision, Nikon's dealer contracts contained clauses that implicitly or explicitly prohibited parallel imports into Switzerland. Nikon's distribution contracts with its resellers in the EEA provided for an obligation of the resellers

not to sell Nikon's products outside the EEA (to which Switzerland does not belong). The decision is under appeal.

Further, in May 2012, the ComCo fined BMW AG 156 million Swiss francs for impeding parallel imports into Switzerland. According to the decision, a clause in BMW Group's contracts with authorised dealers in the EEA prohibits them from selling BMW and Mini vehicles to customers outside the EEA (to which Switzerland does not belong). The investigation was opened in autumn 2010 after the ComCo received various complaints by Swiss customers who had tried unsuccessfully to purchase a BMW or Mini vehicle from a dealer outside Switzerland. The decision is under appeal.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Any direct or indirect obligation of a buyer to purchase from the supplier or from another company designated by the supplier more than 80 per cent of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market is regarded as a non-compete obligation (VN, section 6). Such non-compete obligations that are agreed to for more than five years (which includes agreements concluded for an indefinite period of time or containing a 'rollover' mechanism for automatic renewal) or for more than one year after termination of the vertical agreement are generally deemed to be significant restrictions of competition.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

Restrictions on a buyer's ability to sell non-competing products do not constitute a significant restriction of competition by their object under the Verticals Notice (VN, section 12 e contrario) and must be assessed on a case-by-case basis. In a qualitative selective distribution system, such restrictions must not go beyond what is necessary (see question 33).

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

Restrictions of the members of a selective distribution system not to sell different brands are possible, as long as the restriction is not targeted at the brands of particular competing suppliers (VN, section 12(2)(h)). In case of non-selective distribution agreements, restricting the buyer's ability to stock competing products is admissible subject to certain limitations regarding non-compete obligations (see question 39).

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

An obligation of the buyer to purchase from the supplier more than 80 per cent of its requirements of the contract products, based on the value of its total purchases in the previous calendar year, is regarded as a non-compete provision (see question 39). There is no specific provision on requiring a buyer to purchase a full range of the supplier's products, which must be assessed on a case-by-case basis. In a qualitative selective distribution system, such a restriction must not go beyond what is necessary (see question 33).

43 To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements?

There are no special provisions for franchise agreements. In a decision regarding the prohibition of parallel imports of toothpaste, the ComCo held that the presumption of an elimination of effective

competition by an agreement on absolute territorial protection applies not only in distribution agreements (as the wording of CartA, article 5(4) would seem to imply), but also if such a clause is contained in a licence agreement. The Federal Administrative Court confirmed this decision (see 'Update and trends'). It is therefore possible that the ComCo would apply this provision to a franchise agreement.

44 Explain how restricting the supplier's ability to supply to other buyers is assessed.

If the market share does not exceed 30 per cent on the relevant market, the buyer may restrict the supplier not to supply the contract products to other buyers. Beyond the 30 per cent market share threshold, an individual assessment has to be undertaken whether or not the restriction can be justified on economic efficiency grounds (VN, section 16 (3)).

45 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

If the market share does not exceed 30 per cent on the relevant market, the buyer may restrict the supplier not to sell the contract products directly to end-consumers. Beyond the 30 per cent market share threshold, an individual assessment has to be undertaken whether or not the restriction can be justified on economic efficiency grounds (VN, section 16 (3)).

Members of a selective distribution system must not be restricted from actively or passively selling to end-consumers (VN, section 12(2)(c)). Suppliers must not be restricted either from selling components or spare parts to end-consumers or repair workshops (VN, section 12(2)(e)).

46 Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

No.

Notifying agreements

47 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

Agreements (whether vertical or horizontal) can be notified to the ComCo before the respective restriction of competition takes effect (CartA, article 49a(3)). Such a notification seems advisable if the agreements in question entail a considerable investment, for example, the introduction of a new distribution system.

By notification of vertical restrictions of competition prior to their taking effect, the notifying company does not run the risk of being fined pending a reaction of the ComCo to the notification (see CartA, article 49a(3)(a)). If the ComCo does not respond within five months of the notification, the notifying company may not be fined for the notified restrictions of competition (which may theoretically still be held to be unlawful at a later state). Conversely, if the company is informed by the ComCo of the opening of a procedure under CartA articles 26 to 30 within those five months, and if it then continues the restriction of competition, a fine can be imposed for the future.

In general, no reasoned decision will be published at the end of the formal notification procedure if no procedure under CartA, articles 26 to 30 is opened. However, there might be a press release of the competition authorities.

Authority guidance

48 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

Besides the notification possibility and the ensuing opposition proceedings (see question 47), companies may seek guidance from the Secretariat. According to CartA, article 23(2), the duties of the Secretariat include advising companies on matters relating to the application of the law. However, officials of the Secretariat have indicated in public speeches that the Secretariat is reluctant to further provide guidance, allegedly due to shortage of staff. In addition, guidance by the Secretariat will not always result in a clear answer, and it does not bind the ComCo and hence does not eliminate the risk of a fine.

Complaints procedure for private parties

49 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Private parties can explicitly complain to the ComCo. According to CartA, article 26(1), the Secretariat may conduct preliminary investigations at the request of enterprises concerned. If there are signs of an unlawful restraint of competition, the Secretariat will open an investigation with the consent of a member of the ComCo's presiding body (CartA, article 27(1)). In return, if there are no such signs, the Secretariat will close the preliminary investigation without any further consequence. The approximate time period for such a preliminary investigation may be considerable and extend over a couple of years.

If alleged vertical restraints have effects solely on the relationship between private undertakings, do not have a significant impact on the market and thereby do not involve public interests, the Secretariat may refer the complaining party to private enforcement before a civil court (see question 54).

Enforcement

50 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

Swiss antitrust law is often applied to vertical restraints, as Swiss authorities are particularly concerned about the allegedly higher prices in Switzerland compared to neighbouring countries. However, the number of decisions does not match the number of (preliminary) investigations the Secretariat conducts. In 2002, the Swiss authorities reported some 120 cases regarding vertical agreements. Based on 76 cases that had been closed by the time the annual report for 2003 was published, not one unlawful vertical agreement had been found. Either the CartA was not applicable, or there were no competition problems, or, in some cases, there was an amicable settlement. From 2004 to 2012, the Swiss authorities conducted 71, 90, 80, 46, 39, 39, 42, 61 and 55 (preliminary) investigations in a given year. The figures for 2013 have not yet been published. Based on the published statistics, one cannot allocate these cases to specific types of restraints, but a considerable share have concerned vertical restraints. In 2009, the ComCo issued the first three decisions in which fines were imposed in cases of vertical restraint. The ComCo issued no decision in this area in 2010, one decision in 2011, two decisions in 2012 and one decision in 2013 (see question 52 and 'Update and trends').

Update and trends

2013 saw one decision in which the Competition Commission (ComCo) imposed fines for vertical restraints concerning the ban on parallel import: the ComCo concluded that exclusive supply terms for French-language books agreed between 10 distributors of French-language books active in French-speaking Switzerland and a French publisher infringed the Cartel Act (CartA), article 5. This decision has been appealed to the Federal Administrative Court, which will now have to decide on several questions regarding the application of the CartA to vertical restraints and the application of the ComCo's Vertical Notice.

In December 2013, the Swiss Federal Administrative Court approved the appeals of Eli Lilly (Suisse) SA, Bayer (Schweiz) AG and Pfizer AG regarding pharmaceutical products: in a November 2009 decision, the ComCo held that non-binding public price recommendations for specific non-reimbursable pharmaceutical products constituted illegal vertical price-fixing according to CartA, article 5(4). The decision was set aside on appeal by the Federal Administrative Court. The court approved the appeals on the basis that regulatory and factual impediments made price competition impossible in the market in question. The decision was appealed to the Federal Supreme Court.

Further, the court confirmed a decision of the ComCo concerning restrictions on passive sales: in November 2009, the ComCo fined Gebro Pharma GmbH, with headquarters in Austria, and Gaba International AG. The ComCo considered that restrictions of passive sales in a licence agreement infringed CartA, article 5(4). In this decision regarding the prohibition of parallel imports of toothpaste, the ComCo held that the presumption of an elimination of effective competition by an agreement on absolute territorial protection applies not only in distribution agreements (as the wording of CartA, article 5(4) would seem to imply), but also if such a clause is contained in a licence agreement. This decision has been appealed by both companies, which were fined.

On 17 May 2013, Federal Councillor Johann N Schneider-Ammann and EU Competition Commissioner Joaquín Almunia signed an agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws. Once ratified, it will enable the exchange of confidential information and the cooperation of competition authorities in order to avoid duplication (see Federal Council Dispatch dated 22 May 2013, BBI 2013 3959).

51 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

A contract containing prohibited vertical restraints (a restriction eliminating effective competition or a restriction substantially affecting competition that cannot be justified) is null and void based on Swiss civil law (Code of Obligations, article 20(1)). According to the principle of severability (which is set forth in the Code of Obligations, article 20(2)), if the defect only affects particular parts of the contract, then only those parts shall be null and void, unless it is to be presumed that the contract would not have been concluded without the defective parts.

52 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The ComCo is empowered to impose penalties itself (CartA, articles 18(3) and 53). The Secretariat, in return, conducts the investigations and makes proposals to the ComCo (CartA, article 23(1)). The ComCo may impose a fine of up to 10 per cent of the respective companies' turnover in Switzerland in the previous three business years. The amount of the sanction is dependent on the duration and severity of the unlawful behaviour. A remedy may consist in reaching an amicable settlement, which will be decided by the ComCo on a proposal from the Secretariat (CartA, article 30(1)). As far as remedies are concerned, the authorities are particularly interested in removing any obstacles to parallel imports and in scrutinising price recommendations having – allegedly – the effect of fixed prices. The Verticals Notice explicitly treats price recommendations with suspicion from the outset.

In 2009, the ComCo issued the first three decisions in which fines were imposed in cases of vertical restraints:

- fines of 55,000 Swiss francs in total were imposed for an agreement on resale price maintenance with respect to gardening scissors (this decision was based on a leniency application and an amicable settlement and was thus not appealed);
- fines of 5.7 million Swiss francs in total were imposed for public price recommendations regarding specific non-reimbursable pharmaceutical products. The Federal Administrative Court approved the appeals. This decision has been appealed (see 'Update and trends'); and

- fines of 4.81 million Swiss francs were imposed for an agreement prohibiting parallel imports of toothpaste. The Federal Administrative Court approved the decision of the ComCo. The decision is under appeal (see 'Update and trends').

In 2010, the ComCo issued no decision in which a fine was imposed in cases of vertical restraints. In 2011, the ComCo issued one decision (Nikon) in which a fine was imposed in cases of vertical restraints, where fines of 12.5 million Swiss francs in total were imposed for an agreement prohibiting parallel imports in the area of photographic cameras (this decision was appealed to the Federal Administrative Court). In 2012, the ComCo fined BMW 156 million Swiss francs for impeding direct and parallel imports into Switzerland (the decision is under appeal) and imposed a fine of 470,000 Swiss francs for retail price maintenance agreements in relation to alpine sports products (the decision is under appeal). 2013 saw one decision in which the ComCo imposed fines for vertical restraints (see 'Update and trends').

Investigative powers of the authority

53 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

Parties to vertical agreements are required to provide the competition authorities with all relevant information and to produce all necessary documents (CartA, article 40). The competition authorities may also hear third parties as witnesses and require the parties to the investigation to make statements (CartA, article 42(1)). The competition authorities may order searches and seize documents (hard-copy and digital) (CartA, article 42(2)). In this context all documents and electronic databases located at the undertaking's premises as well as at the houses of managers can be searched and seized, including documents that might be protected by legal privilege in other jurisdictions, with the exception of 'defence correspondence' – correspondence with an external lawyer related to an ongoing investigation. The competition authorities also demand information from suppliers domiciled outside Switzerland. Owing to a lack of international treaties in the area of competition law (with the notable exception of the area of civil aviation, where a bilateral agreement between Switzerland and the European Union exists), such requests may not be enforceable.

Private enforcement

54 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Private enforcement is possible under Swiss antitrust law. The right to sue, however, is limited to a person impeded by an unlawful restraint of competition from entering or competing in a market. Such a person may request removal or cessation of the obstacle (eg, conclusion of contracts at market terms), damages and reparations, and the remittance of illicitly earned profits (CartA, articles 12(1), 13). Up to now, private enforcement has not been used very frequently. This is mainly due to the high burden of proof and the substantial cost risk, since court costs and the other party's legal costs must usually be borne by the losing party in the proceedings. In a 2008 report on the evaluation of the effectiveness of the CartA, measures for strengthening private enforcement were recommended.

In a consultation proposal published in 2010 for an amendment of the CartA, the Swiss government suggested implementing only one of these proposals, with respect to the statute of limitations.

Other issues

55 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

It is the stated aim of the ComCo to bring Swiss provisions on competition law in line with the EU competition provisions in the area of vertical restraints (VN, recital VI). Important adaptations and an approximation to the legal situation in the European Union are made in the new Verticals Notice for the assessment of price recommendations (VN, section 15) as well as with respect to the importance of inter-brand competition (VN, section 11). In addition, the introduction of the additional (buyer) market share threshold in EU competition law has also been reflected in Swiss law. However, actual harmonisation with EU competition law has not yet been fully achieved.

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