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National Rapport

Question A: Competition Law

"Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships"

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1. LEGAL FRAMEWORK

1.1 What is the legal framework in the national competition act applicable to vertical agreements, i.e. are these agreements in generally permissible or in part impermissible. Are vertical agreements or some of them illegal per se, presumed illegal or assessed on the basis of a type of rule of reason analysis? Does a block exemption apply to vertical agreements in your jurisdiction?

Legal framework applicable to vertical agreements

In 1995, the Federal Act on Cartels and other Restraints of Competition (hereinafter "CartA") introduced a range of new provisions into Swiss competition law. Following the EU practice, three pillars of competition enforcement policy were adopted. First, the agreements which restrict competition; secondly, abuse of dominant position; and finally, concentrations of enterprises, which create or strenghten a dominant position.

In 2003, the CartA was partailly revised and new instruments, such as for instance direct sanctions, were adopted (as per April 1, 2004 in force). Regarding the vertical agreements, a presumption of elimination of effective competition in case of fixing of prices and vertical geographical segementation of markets was adopted.

The Swiss Competition Commission (hereinafter "ComCo") released a number of communications on specific subjects in regard to vertical agreements, which in practice are de facto binding. At this time, the ComCo has adopted communications on the following subjects:

- Communication on the Cartel Law Treatment of Vertical Restraints (2nd revision, July 2, 2007, hereinafter "Revised Communication");
- Communication and Explanation regarding the Trade with Automobiles (October 21, 2002);
- Communication on Agreements with limited Effects on the Market regarding SME (December 19, 2005).

Unlawful agreements – general rule

Under Art. 4 Para. 1 CartA all legally binding and non-binding agreements (such as contracts, arrangements, Gentlemen's agreements) that *aim* at restricting competition or have this *effect* as well as concerted practices of enterprises operating at the same or at different levels of the market, are considered agreements that affect competition.

The material Swiss competition law is, in contrast to European competition law, based on the *principle of abuse*. It is not per se illegal. According to Art. 5 Para. 1 CartA agreements that significantly affect competition in the market for certain goods or services and are not economically justified and all agreements that lead to the suppression of effective competition are unlawful.

Presumption of elimination effective competition

According to Art. 5 Para. 3 and 4 CartA, hardcore restraints, i.e. *horizontal agreements* which directly or indirectly fix prices, restrict quantities of goods or services to be produced, bought or supplied, or allocate markets geographically or according to trading partners, as well as *vertical agreements*, which stipulate minimum or fixed resale prices or completely isolate geographical markets, are under the Swiss system presumed to completely eliminate effective competition.

These legal presumptions can be, however, rebutted if it can be proved that effective competition does exist despite such agreements. This may be the case if some competition

parameters are not entirely affected. Once the presumption of complete elimination is successfully rebutted, the ComCo will perform economic efficiency tests to assess justifiability based on a type of *rule of reason* analysis.

If the presumption cannot be turned over and the restrictions cannot be justified, sanctions of up to 10% of the aggregate turnover in Switzerland of the last three business years of the enterprises participating in the agreement may be pronounced against the enterprise that issued the restrictions as well as those who followed it (Art. 49a Para. 1 CartA).

1.2 Do these principles vary depending on the type of vertical practice considered?

Pursuant to the general rule in Art. 5 Para. 1 CartA, agreements that significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency and all agreements that lead to the suppression of effective competition are unlawful.

This principle is more restrictive in case of two types of vertical agreements, in which case the elimination of effective competition is per se presumed. More precisely, it concerns firstly agreements regarding fixed or minimum prices ("resale price maintenance", hereinafter "RPM"), secondly agreements in distribution contracts regarding the allocation of territories in so far as sales by other distributors into these territories are not permitted (Art. 5 Para. 4 CartA).

However, Art. 5 Para. 4 CartA does not apply to vertical agreements setting forth maximum sale prices, but only to vertical agreements on minimum or fixed sale prices. In the former case, the distributor cannot sell below a specific price whereas, in the latter case, the distributor cannot sell at a price other than the fixed price. The text of Art. 5 Para. 4 CartA does not, unlike Art. 5 Para. 3 CartA, specify whether or not the presumption applies to "direct or indirect" price fixing. The Revised Communication does not clarify this point either.

1.3 Is there a specific prohibition in the national competition act on all vertical practices pertaining to prices? If not, which ways of controlling the prices applied to end-users are permissible?

As already mention in Section 1.1. and 1.2., Art. 5 Para. 1 CartA provides a general rule concerning vertical agreements. Art. 5 Para. 4 CartA applies more specifically to vertical agreements regarding *fixed or minimum prices* (presumption of elimination of effective competition). Additionally, Cipher 11(2) of the Revised Communication provide special criteria, which shall be assessed on a case-by-case basis in order to determine whether the vertical agreements taking the form of *price recommendations* fall under the per se presumption of Art. 5 Para. 4 CartA.

1.4 What is the de minimis / appreciability threshold, if any, applicable to vertical arrangements and practices?

According to Art. 5 Para. 1 CartA agreements that *significantly* affect competition are considered to be unlawful (cf. Section 1.1. and 1.2.). The CartA itself does not know any "de-minimis" rule.

However, according to the Cipher 13(1) of the Revised Communication if the aggregate market share held by each party to the agreement does *not exceed 15 %* of any of the relevant markets affected by the agreement, the ComCo assumes that such agreement, unless it falls within the scope of the Cipher 10(3) oder Cipher 12 of the Revised Communication (so-called "hardcore restrictions") does not in principle *significantly* impede competition and therefore is deemed to be lawful (the Revised Communication increased this threshold from 10 % under the Communication of February 18, 2002).

1.5 Has the competition authority in your jurisdiction issued guidelines regarding exchanges of information and /or vertical price agreements?

On July 2, 2007, the ComCo adopted the Communication on the Cartel Law Treatment of Vertical Restraints (Revised Communciation) (cf. Section 1.1.), which replaces the previous Communication of February 18, 2002. It is inspired by Commission Regulation 2790/1999 of December 22, 1999 (so called "Block Exemption Regulation") and by the European Commission's Guidelines on the assessment of vertical restraints (the "Guidelines on Vertical Restraints").

2. CRITERIA APPLICABLE TO PRICE RELATED VERTICAL AGREEMENTS

2.1 Is the national competition act declaring these or some of these practices as illegal under a per se rule, presumption or rule of reason?

The material Swiss competition law, as already mentioned in Section 1.1., is based on the *principle of abuse*. It is not per se illegal. Pursuant to the general rule in Art. 5 Para. 1 CartA, any such agreement, in vertical or horizontal relationships, can qualify as anti-competitive and thus *unlawful* only if it has the purpose or the effect to significantly affect competition, and if it either completely excludes or significantly impairs effective competition without economic grounds for justification.

Art. 5 Para. 4 CartA provides a presumption which however concerns the elimination of effective competition in case of only two types of vertical agreements: RPM as well as agreements in distribution contracts regarding the allocation of territories in so far as sales by other distributors into these territories are not permitted.

2.2 Are only agreements pertaining to prices considered illegal? Which conditions have to be fulfilled in order to render "agreements" to be considered illegal?

Art. 5 Abs. 4 CartA states explicitly that a presumption of elimination of competition concerns vertical agreements, which stipulate minimum or fixed resale prices or completely isolate geographical markets (cf. also Cipher 10(1) of the Revised Communication).

One of the most controversial aspects of the Revised Communication is the statement made in Cipher 10(1)(a) of the Revised Communication that the presumption of Art. 5 Para. 4 CartA also applies to agreements taking the form of price recommendations imposing a minimum or fixed price. However, in Cipher 11(1) of the Revised Communication, the ComCo declares that price recommendations addressed by producers or suppliers to resellers or distributors shall be assessed on a case-by-case basis in order to determine whether they constitute an unlawful agreement according to Art. 5 Para. 1 CartA.

Therefore, the relation between Cipher 10(1)(a) and Cipher 11(1) of the Revised Communication is not clear and a bit contradictory. Indeed, either the ComCo considers that agreements taking the form of price recommendations fall under the per se presumption of Art. 5 Para. 4 CartA or it considers that they must be assessed on a case-by-case basis. In the practice of the ComCo not all agreements taking the form of price recommendations are automatically caught by the presumption of Art. 5 Para. 4 CartA, but only those which are unlawful according to Cipher 11(2) of the Revised Communication, namely whether :

a) the price recommendations are not publicly available, but addressed to the sole attention of resellers or buyers;

b) they are combined with pressure or incentives;

c) they are not explicitly declared as being non-binding;

d) the price level in Switzerland is significantly higher than in the neighboring countries;

e) the majority of sellers and distributors comply with them.

2.3 What is the assessment of vertical unilateral practices in relation to prices?

As mentioned before, the Swiss competition law is based on the principle of abuse, that means, it is not per se illegal. According to Art. 5 Para. 1 CartA agreements that significantly affect competition in the market for certain goods or services and are not economically justified and all agreements that lead to the suppression of effective competition are unlawful.

Thus, two types of unlawful vertical practices are to be distinguished: firstly, agreements (or concerted practices) which significantly affect competition in the market and are not economically justified; secondly, agreements that lead to the suppression of effective competition are unlawful (those are not subject to economic justifications).

Cipher 12 of the Revised Communication lists certain types of vertical agreements that are deemed to be "significant" according to Art. 5 Para. 1 CartA. Practices which are not considered "significant" merely as a result of a de minimis/appreciability rule will be discussed in Section 2.4 of this Report.

Additionaly, Art. 5 Para. 4 CartA provides a per se presumption of eliminating of effective competition. These legal presumptions can be rebutted if it can be proved that effective competition does exist despite such agreements. According to the Revised Communication, the rebuttal of the presumption of Art. 5 Para. 4 CartA is not possible by only demonstrating that effective inter-brand competition exists (Cipher 10(2) of the Revised Communication). As a result, the Revised Communication also requires proof of intra-brand competition (cf. Section 3.2.). Once the presumption of complete elimination is successfully rebutted, the ComCo will perform economic efficiency tests to assess justifiability, which must be assessed on the case-by-case basis of a type of *rule of reason* analysis.

If the presumption cannot be turned over and the restrictions cannot be justified, sanctions of up to 10% of the aggregate turnover of the last three business years of the enterprises participating in the agreement may be pronounced against the enterprise that issued the

restrictions resp. recommendations as well as those who followed it (in 2003 introduced Art. 49a Para. 1 CartA).

2.4 Are some of these practices not considered illegal merely as a result of a de minimis/appreciability rule?

According to the Cipher 13(1) of the Revised Communication if the aggregate market share held by each party to the agreement does not exceed 15 % of any of the relevant markets affected by the agreement, the ComCo assumes that such agreement, unless it falls within the scope of the Cipher 10(3) oder Cipher 12 of the Revised Communication, does not in principle significantly impede competition and thus is deemed to be lawful (cf. Section 1.4.).

This market share threshold is reduced to 5 % if competition on the relevant market is limited by the cumulative effect of several networks of vertical agreements which have similar effects. However, the ComCo acknowledges that this cumulative foreclosure effect is inexistent if less than 30 % of the relevant market is covered by such parallel networks of agreements having similar effects, in which case the above-mentioned 15 % threshold remains applicable (Cipher 13(2) of the Revised Communication).

By opting for the system of significant impediment of competition by reason of the subject matter of vertical agreements, the ComCo introduced a stricter approach than European competition law. Indeed, the European Commission Notice of December 22, 2001 on agreements of minor importance which do not appreciably restrict competition under Art. 101(1) AEUV (the "De-minimis Notice") provides for a safe harbour with respect to agreements between undertakings which do not appreciably restrict competition if the market share held by each of the parties to the agreement does not exceed 15 % of any of the relevant markets affected by the agreement, unless they contain hardcore restrictions (Cipher 7 (b) and Cipher 11 De Minimis Notice). On the contrary, under the Revised Communication, the above-mentioned vertical agreements are deemed to significantly affect competition, even if the market share held by the parties is below 15 %. Cipher 12 of the Revised Communication lists certain types of vertical agreements that are not deemed to be hardcore restrictions pursuant to European competition law, such as for instance vertical agreements containing non-compete covenants. Thus, whereas these vertical agreements may potentially fall under the 15 % threshold of the De Minimis Notice, the ComCo considers them as significantly impeding competition irrespective of the market shares of the participating undertakings.

3. ANTI-COMPETETIVE EFFECTS

3.1 Are the anti-competitive effects considered by the national competition act different for each of these practices, or is it always the same kind of anti-competitive effect which is considered and found more or less serious?

The CartA defines in Art. 5 Para. 4 two types of hardcore restrains, that means agreements which stipulate minimum or fixed resale prices or completely isolate geographical markets, which are per se presumed to eliminate effective competition. Thus, they are to be considered more serious than the general prohibition according to Art. 5 Para 1 CartA.

3.2 To which extent is the national competition act considering only inter-brand effects or does it consider intra-brand effects?

With respect to RPM, the Commission is eager to rigorously enforce the prohibition in Art. 5 Para. 4 Cart: RPM and the allocation of territories (combined with restrictions on passive sales) are *presumed* to eliminate competition. The Commission now maintains in Cipher 10 of the Revised Communication that it shall no longer be possible to rebute this presumption by proving only residual inter-brand-competition between several distribution systems. By way of consequence, the Revised Communication also requires proof of intra-brand competition.

Therefore, with this new approach Swiss practice seems to more restrictive regarding vertical agreements than European practice. It becomes even more rigid than the CartA's provisions governing horizontal hard-core agreements (Art. 5 Para. 3 CartA), where the presumption of elimination of competition may be rebutted, for instance by showing inter-brand or service competition.

3.3 Is also the anti-competitive intent of the vertical agreement considered?

Intend does not have to be proven. The term "agreements affecting competition" means binding or non-binding agreements and concerted practices between enterprises operating at the same or at different levels of the market, with the purpose *or* effect of which is to restrain competition.

3.4 Do the courts take into account the actual acts performed by the supplier, e.g. if the supplier, in practice encourages a recommended price to constitute a fixed price through punishments or remunerations? Please give examples from case law and/or legal doctrine.

There is no general rule concerning this issue. However, in case of the price recommendation addressed by producers or suppliers to resellers or distributors, if the supplier exercies a pressure upon resellers or buyers in order for them to follow the price recommendations, such price recommendation shall be considered unlawful and thus to eliminate effective competition according to Art. 5 Para. 4 Cart (cf. Cipher 11(2) lit. b of the Revised Communication).

See: *Scott Bikes,* in: Law and Policy on Competition (hereinafter "LPC") 2008/3, p. 382 ff., N. 13 ff; *Hors-list drugs,* Decision of the ComCo of 2. November 2009, N. 107 ff. (not published in LPC yet).

4. PRO-COMPETETIVE-EFFECTS

4.1 Does the national competition act recognize justifications in relation to these vertical practices regarding prices? Has the relevant case law taken into account practical justifications for the need of price agreements and/or pro competitive aspects in relation to the exchange of information regarding price?

According to Art. 5 Para. 2 CartA two cumulative conditions must be filfilled in order to justify the unlawful practices. The justifications may be namely granted based on grounds of

economic efficiencies if 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* when such agreement will not in any way whatsoever allow the enterprises concerned to eliminate effective competition.

See for instance:

- Reduction of production or distribution costs (*Preisbindun,* in: LPD 2005/2, S. 304 f., N. 168 ff.);
- Improvement of products or production processes (*Preisbindung,* in: LPD 2005/2, S. 276 f., N. 46 ff.).

4.2 What are the types of pro-competitive effects recognized in relation to vertical practices on prices?

- Agreements significantly affecting competition may be declared lawful if they are justified on *grounds of economic efficiency* (Art. 5 Para. 2 CartA).

The conditions under which agreements affecting competition are as a general rule deemed to be justified on grounds of *economic efficiency* may be determined by way of ordinances or communications (Art. 6 CartA). The following in particular will be taken into consideration in this respect:

a) co-operation agreements relating to research and development;

b) specialization and rationalization agreements, including agreements concerning the use of schemes for calculating costs;

c) agreements granting exclusive rights to deal in certain goods or services;

d) agreements granting exclusive licenses for intellectual property rights;

e) agreements with the purpose of improving the competitiveness of small and medium sized enterprises, in so far as they have only a limited effect on the market.

- Exceptional authorizations can be granted by the Federal Council, on grounds of compelling *public interests* (Art. 8 CartA).

The agreements affecting competition and practices of dominant undertakings that have been declared unlawful by the competent authority may, upon the application of the parties involved, be authorized by the Swiss Federal Council if, in exceptional cases, they are necessary for the safeguarding of overriding public interest. The granting of such permission by the Federal Council has remained the exception, but did occur in the case of a price-fixing arrangement on the book market in order to safeguard the large variety of publications (The judgement of the Swiss Federal Supreme Court of 6 February 2007 – *Preisbindung*).

4.3 Are the following types of justifications taken into consideration and if yes, in relation to which sort of practices and to which extent?

- **competitive oversight inside the distribution network**

- **price-level positioning of the products by a supplier**
- **consumers benefits in relation to a resale price cap**
- **consumers' interest in general (please specify)**
- **launching of a new product**
- **market positioning of a product**
- **promotional organization**
- **after sale services**
- **coordination with consumers' information**
- **short term promotional campaigns.**

Please give examples from case-law and/or legal doctrine.

In general the ComCo takes those factors into account, there is, however, no relevant practice relating this issue. The official practice of the ComCO in assessing the justification on grounds of economic efficiency will be discussed in Section 4.4 of this Report.

4.4 Does the national competition act and case law take into consideration other justifications?

In principle the ComCo examines whether vertical agreements can be justified on grounds of economic efficiency on a *case-by-case* assessment (Cipher 15(3) Revised Communication).

The ComCo considers that vertical agreements are deemed to be justified without case-by-case assessment if the market share of the supplier on the relevant market does not exceed 30 %. This rule is, however, not applicable to vertical agreements having a cumulative foreclosure effect and significantly impeding competition (that means agreements falling under the scope of the Cipher 12 Revised Communication).

- In general, a *case-by-case* assessment includes improving efficiency of distribution in terms of improved products or production processes, or a diminution of distribution costs. In particular, the ComCo provides for the following justifications (Cipher 15(4) Revised Communication):

a) temporally limited protection of investments necessary to enter new geographic or product markets;

b) safeguarding consistency and quality of the contracted goods or services;

c) protection of specific contractual investments which cannot be used or can only be used with great loss of the business relationship (hold-up problem);

d) prevention of free-rider problems;

e) prevention of double marginalization problems;

f) facilitating the transfer of essential know-how;

g) securing financial engagements (such as loans) which are not granted by the financial markets.

4.5 Are pro-competitive effects automatically taken into consideration by the authorities / the courts or ought they be invoked by the interested parties?

The ComCo proceeds ex officio on a *case-by-case* assessment. However, if the market share of the supplier on the relevant market does not exceed 30 %, the ComCo considers that vertical agreements are deemed to be justified without case-by-case assessment. This rule is not applicable to vertical agreements having a cumulative foreclosure effect and significantly impeding competition (cf. Section 4.4.).

4.6 Might any of these justifications have anti-competitive effects and are they considered in the national competition act and case law ?

There is no relevant practice relating this issue.

4.7 Have these justifications led to the conclusions that the agreement is not covered by a prohibition on anti-competitive agreements or to an exemption from the competition rules?

In general possible. The ComCo performs economic efficiency tests to assess justifiability based on a type of *rule of reason* analysis. However, up to now no practice relating this issue.

4.8 In your opinion do the antitrust authorities sufficiently take into consideration the pro-competitive effects of some of these practices?

Yes, it does. The ComCo in its practice takes sufficiently into consideration the pro-competetive effects of these practices. Its efforts are additionaly confirmed in the Revised Communication.

5. SANCTIONS

5.1 Is the national competition legislation sanctioning vertical practices in general and if yes through which forms of sanctions; administrative and/or criminal or other?

Art. 49a Para. 1 CartA stipulates that an enterprise that participates in an unlawful agreement, in terms of Art. 5 Para. 3 and 4 CartA, or that behaves unlawfully in terms of Art. 7 CartA, will be required to pay a sanction of up to 10 per cent of its turnover in Switzerland within the previous three business years. The amount of the sanction is dependent on the duration and severity of the unlawful behavior. The a priori profit thereby achieved by the enterprise will also be taken into consideration.

Accordingly, Art. 49a Para. 1 CartA applies not to *all vertical agreements in general*, but only to those vertical agreements covered in Art. 5 Para. 4 CartA.

The CartA is completed by the Federal Council's Ordinance on Sanctions (hereinafter "OS") of April 1, 2004, which regulates the assessment criteria for the imposition of sanctions in accordance with Art. 49*a* Para. 1 CartA.

Direct sanctions under Art. 49a Para. 1 CartA are regulated under the section: "administrative sanctions", they contain, however, some penal elements.

5.2 Are the above practices subject to sanctions as well?

Art. 49a Para. 1 CartA is only addressed to unlawful agreements in terms of Art. 5 Para. 3 and Para. 4 CartA and to unlawful practices under Art. 7 CartA (cf. Section 5.1.). Other sanctions are provided for by Art. 50 ff. CartA.

5.3 Is the specificity of vertical relationships, for instance the lesser harm in relation to intra-brand restrictions, taken into consideration in the application of sanctions?

The direct sanctions are assessed according to the OS and taking into account the circumstances of the individual case, with duration and gravity of the infringement being of particular relevance and the gains deriving from the infringement being considered as well. Further elements taken into account by the ComCo are the willingness of the company's corporate bodies to cooperate, a repeated infringement of the cartel prohibition, attempted difficulties of the ComCo's investigation activities, etc. In this regard, administrative fines may be reduced, e.g., if the company ceases the unlawful activity after an intervention of the ComCo. Finally, the possibility to formally inform the ComCo of agreements exists, when in doubt of their compliance with CartA. Pursuant to Art. 49 Para. 3 CartA, such notice to the Commission must be made prior to the agreement in question factually becoming effective. This procedure is to be distinguished from the leniency.

5.4 What are the major fines in your jurisdictions (in EUR) for vertical restraints? In which context have they been imposed? What is the major criminal or other sanction imposed?

The ComCo imposed up to now only few sanctions under Art. 49a Para. 1 CartA concerning vertical restrains. The most important are presented below.

In the investigation *Hors-list drugs*[1] concerning the market of drugs against erectile dysfunction, the Secretariat investigated the admissibility of price recommendations. In this case, the manufacturers recommended retail prices for the sales to end-consumers. Following an investigation opened in 2006 into prices charged for erectile dysfunction medication (which includes Viagra, Cialis and Levitra), the Secretariat came to the conclusion that Bayer (Schweiz) AG, Eli Lilly (Suisse) SA and Pfizer AG made unlawful vertical competition agreements that maintained a recommended public selling price.

Under Art. 5 Para. 4 CartA, vertical agreements are deemed to eliminate competition if they include retail price-fixing. Criteria according to which price recommendations may be deemed as unlawful and thus come under Art. 5 Para. 4 CartA have been set out by the ComCo in the Cipher 11(2) of Revised Communication and must be analysed on a case-by-

[1] Decision of the ComCo of 2. November 2009 – Hors-list drugs.

case basis. Considering that the price recommendations were followed by a large majority of drug stores and physicians, the Secretariat came to the conclusion that the publication and observance of the recommended retail prices for the medicines Viagra, Cialis and Levitra represented illegal vertical collusion between the producers and distributors and imposed sanctions.

As a result the ComCo imposed a total fine of **CHF 5.7 million** on the pharmaceutical companies concerned, Pfizer AG, Eli Lilly, and Bayer Bayer AG, up to now the highest sanction imposed in Switzerland for vertical restrains.

In *Gaba*[2] case the ComCo fines Gaba for prohibiting parallel imports of Elmex toothpast. On November 30, 2009, the ComCo imposed a fine on the manufacturer of Elmex toothpaste, Gaba International SA (a subsidiary of the US company Colgate-Palmolive), on account of the export prohibition Gaba had imposed on its Austrian license holder, Gebro Pharma GmbH. The ComCo found that this clause constituted an unlawful ban on parallel imports into Switzerland and foreclosed competition in Switzerland. The 1982 agreement between Gaba and Gebro included an export prohibition on Elmex products manufactured under license by Gebro (at least through September 2006). As a result, Swiss retail companies were prevented from buying Elmex products at lower prices in neighbouring markets. After Denner, a discount supermarket chain, filed a complaint noting that it was being prevented from importing Elmex products from Austria, the ComCo opened an investigation. As a result, the ComCo fined Gaba **CHF 4.8 million** for the ban on parallel imports. Gebro was fined a mere symbolic CHF 10,000 because it did not benefit from the ban.

6. ASSESSMENT

6.1 Is the national competition act sufficiently taking into consideration the specificity of vertical agreements when dealing with price-related practices?

Art. 59a CartA requires the Swiss governement to evaluate the effectiveness of the CartA revised in 2003 and its implemetation, at latest five years after entry into force of this provision. The Swiss governement shall subsequently submitt a report and recommendations on further steps to Parliamant. Such evaluation was conducted by the the special expert group in 2007-2008 and summarized in a paper in January 2009 (“Synthesis Report”).

Taken as a whole, the CartA has achieved its purposes. The instruments provided in the revision of the CartA in 2003 (leniency program, opposition proceedings, and raids)

[2] Decision of the ComCo of 30. Novemeber 2009 – Gaba.

accomplish the goals of the legislator. However, some improvements are feasible and necessary, in particular regarding the vertical practices.

In the treatment of vertical restraints, the current Swiss law with Art. 5 Para. 4 CartA, which presumes elimination of competition by two types of vertical agreements and additionally with the Revised Communication, was estimated to be much more restrictive than the international standards.

On the implementation level, in the analysis of the presumption on vertical agreements, it was concluded from economic theory that all types of vertical agreements can potentially imply efficiency effects. Thus, it was found that the current presumption in the CartA that the certain vertical agreements eliminate effective competition and additionaly a restrictive approach in the Revised Communication risk preventing efficient agreements. According to the recommendation of the experts group, Switzerland should consequently abandon the legal presumption of unlawful conduct.

The new revision of the CartA and the Revised Communication is thus necessary. According to the experts group the vertical agreements shall be assessed on the case by case basis, taking into account each time direct and indirect positive and negative effects on competition law and policy, especially based on grounds of economic efficiencies. Last but not least, in the assessment of vertical agreement intra-brand competition should be also considered.

6.2 Is the case law evolving? Towards which tendency? On which points are an evolution of the situation advisable?

According to the Synthesis Report (cf. Section 6.1.), the studies on the effects-based analysis have demonstrated the known limits of the methods of *quantitative effects-based* measurement. These studies confirm that a modern antitrust law and a dynamic and independent competition authority are very important for the economy of Switzerland. The legislators are thus on the right track. Antitrust law must be incisive, and the competition authority must have the means to apply the law. The ComCo shall evaluate efficicency and conformity of its work on a regular basis in order to prevent errors in the application of the regulations.

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