

## Briefing July 2017

# Swiss Competition Commission Updates Notice on Vertical Restraints and Releases Explanatory Guidelines

The Swiss Competition Commission (**ComCo**) has updated its notice on vertical restraints of 28 June 2010 (**Notice on Vertical Restraints**) following the Colgate-Palmolive judgment of the Swiss Federal Supreme Court (**FSC**). In this judgment, the FSC held that an export ban in an Austrian licence agreement had infringed the Swiss Act on Cartels (**CA**). In addition, ComCo has released explanatory guidelines on the Notice on Vertical Restraints (**Guidelines**).

## Background

On 28 June 2017 (see Bär & Karrer Briefing of April 2017) the FSC held that Colgate-Palmolive Europe Sàrl (**Colgate-Palmolive**, the successor of GABA International AG) had infringed the Swiss Act on Cartels by barring its licensee Gebro Pharma GmbH (**Gebro**) from making parallel exports out of Austria.

The FSC held that a restriction of passive sales would **'generally' restrict competition significantly** without ComCo having to establish a quantitative significant restriction of competition (for example based on high market shares of the parties or on a high adherence rate to the agreement).

## Updated Notice on Vertical Restraints

ComCo has now updated its Notice on Vertical Restraints to reflect the Colgate-Palmolive judgment.

The updated Notice on Vertical Restraints clarifies that vertical agreements falling under Article 5(4) CA generally restrict competition significantly.

Article 5(4) CA states that the following two types of agreements between a supplier and buyer are presumed to eliminate effective competition:

- Agreements restricting the buyer's ability to determine its resale price;
- Distribution agreements restricting the territory into which the buyer may make passive sales.

Historically, Article 5(4) CA was intended to mirror Article 4(a) and 4(b) (first exception) of the Block Exemption Regulation (EC) No 2790/1999 of 22 December 1999 of the European Commission on vertical agreements.

## Guidelines

ComCo has also published explanatory Guidelines on the Notice on Vertical Restraints.

Generally, the Guidelines tend to be in line with the Block Exemption Regulation (EU) No 330/2010 of 20 April 2010 of the European Commission on vertical

agreements and the European Commission's guidelines on vertical restraints of 2010. Vertical agreements that do not contain hardcore restrictions, are generally deemed to be justified for reasons of economic efficiency, if the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.

There remain, however, some differences to the EU competition law. The following aspects of the Guidelines are noteworthy:

#### **Recommended resale prices**

The Notice on Vertical Restraints states that if recommended resale prices are adhered to by a significant proportion of the dealers, ComCo may 'take them up'. It was not clear whether this meant that ComCo was of the view that the mere adherence to recommended resale prices would constitute an agreement on a resale price maintenance.

The Guidelines now make clear that – to assume an agreement – a minimal concurrence of wills in relation to the adherence to the recommended resale price is required. This means that a mere adherence is not enough to make a recommended resale price a resale price maintenance. This is a welcome clarification.

#### **Franchise-, licence- and technology transfer-agreements**

The Guidelines state that Article 5(4) CA also captures distribution clauses in franchise-, licence- and technology transfer-agreements. ComCo's view is not compatible with the legislative history of Article 5(4) CA. The legislative history shows that the legislator wanted to exempt technology transfer-agreements from Article 5(4) CA by inserting the term 'distribution agreements'.

However, ComCo's view may be of limited practical relevance if the restriction of passive sales of the licensee can be justified for reasons of economic efficiency under the same conditions as it is block

exempted under the Block Exemption Regulation (EU) No 316/2014 on technology transfer.

#### **EEA distribution agreements**

The Guidelines further state that EEA agreements that restrict passive sales out of the EEA or out of a part of the EEA are captured by Article 5(4) CA.

This serves as a reminder that when drafting EEA agreements, the territory of Switzerland should always be treated as if Switzerland were an EU Member state.

#### **Purchasing obligations of the buyer**

The Guidelines state that an obligation of Swiss dealers to purchase the contractual goods only in their territory would amount to an indirect restriction of passive sales (therefore falling under Article 5(4) CA).

While this view of ComCo is supported by a judgment of the Federal Administrative Court, it is nevertheless incorrect and impractical. Read properly, Article 5(4) CA only captures the restriction of passive **sales** and not the restriction of **purchases** by the buyer. ComCo's view unnecessarily casts doubt on the legality of provisions that are perfectly legitimate such as sole purchasing obligations of a limited duration of five years.

#### **Cumulative effect of parallel networks of similar vertical agreements**

The Guidelines and the Notice on Vertical Restraints appear to suggest that parallel selective distribution systems of different suppliers that jointly cover more than 30% of the market would need to be justified for reasons of economic efficiency on an individual basis even if no supplier or buyer exceeds the 30% market share threshold.

Such a view of ComCo would not be correct. To establish a cumulative effect of parallel networks of similar vertical agreements, ComCo has to show that the parallel networks of similar vertical agreements restrict competition, for example by foreclosing more efficient distributors. The mere existence of parallel networks of similar vertical agreements is not sufficient for the finding of a cumulative effect.

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