The Dominance and Monopolies Review

Editor
Maurits Dolmans

Law Business Research

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EDITOR'S PREFACE

This publication is a testament to the proliferation of abuse of dominance legislation around the world. Its coverage considers legislative provisions that have, in the case of the United States, been in existence since 1890, to some, in jurisdictions such as China and India, that have been introduced in the past few years or, in Malaysia's case, last year. This diversity of jurisdictions has led to a multiplicity of differing approaches and indicates, as underlined by the national and supra-national surveys contained in this book, the real need for greater legal certainty and clarity in both the future drafting and application of laws governing abuse of dominance.

The disparities in the approaches taken by different and even well-established jurisdictions can be significant. As an example, a contrast may be drawn between the law of the United States and the European Union.

In the United States, Section 2 of the Sherman Act[1] is in certain respects being narrowly construed and applied by the courts, the Department of Justice (most notably through its Guidelines) and, to some extent, the Federal Trade Commission ('FTC'). This may be attributed to a wish to reduce the burdens of US litigation, in light of the costs imposed by the discovery system and the risks created by trial by jury, awards of treble damages, as well as the litigation incentives inherent in contingency fees and class actions.

By contrast, the approach taken by the European Union in the application of Article 102 of the Treaty of the Functioning of the European Union ('TFEU') goes too far in the opposite direction. For much of the life of Article 102 TFEU and its predecessors, the European Commission and courts have embraced a form-based rather than effects-based approach. The high-water mark of this may be seen in the

1 15 USC Section 2.

Commission decisions and subsequent court judgments in *British Airways*[2] and *Tomra*,[3] where it was sufficient to show that the conduct in question was merely liable to affect competition, rather than having to prove actual effects and harm to consumers. This form-based application may stifle pro-competitive conduct, taking into account the essentially political decision-making in large cases, the risk of confirmation bias (where the investigator is the prosecutor, judge and executioner), the slow and therefore costly procedure, the risk of high fines and opportunistic follow-on damage claims, and the marginal judicial review of prohibition decisions by the General Court and the Court of Justice of the European Union. The combination of these factors is a powerful disincentive for a possibly dominant undertaking to engage in any competitive conduct that may be found to constitute abuse.

Given the influence of European Union abuse of dominance law, particularly on emerging jurisdictions such as India and China (where similar factors apply to an even larger extent), the use of a form-based analysis may have a negative impact on the development of the law far beyond Europe's borders.

A happy medium or Mid-Atlantic point needs to be found between these divergent approaches. The law of abuse of dominance in Europe (and all jurisdictions that emulate Europe) needs to move away from the form-based approach that has characterised the analysis of abuse of dominance in favour of an effects-based analysis. The institutional groundwork for a turn towards the application of a more economic analysis may have been put in place by the creation of the office of the Chief Competition Economist in 2003 and the publication of the 'Guidance on the Commission's Enforcement Priorities'.[4] Subsequently, in the decisions of the European Commission and judgments of the courts, there have been signs of an incipient analytic shift; both *Microsoft*[5] and, more recently, *Post Danmark*[6] show a growing acceptance of the need for a more effects-based consideration of the abuse of dominance. As the European Court of Justice commented in *Post Danmark*:

> *[…] not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.*[7] *[…] in order to assess the existence of anti-competitive effects […] it is necessary to consider whether that pricing policy, without*

2 Case C-95/04 P, *British Airways plc v. Commission* ('*British Airways*'), judgment of 15 March 2007.

3 Case C-549/10P, *Tomra*, judgment of 19 April 2012.

4 OJ, C45/7, 24 February 2009.

5 Case T-201/04, *Microsoft Corporation v. Commission* ('*Microsoft*'), judgment of 17 September, 2007.

6 Case C-209/10 *Post Danmark v. Konkurrencerådet* ('*Post Danmark*'), judgment of 27 March 2012. Note that this was the Grand Chamber of the Court.

7 Ibid., paragraph 22.

> *objective justification, produces an actual or likely exclusionary effect, to the detriment of competition, and, thereby, of consumers' interests.*[8]

It is hoped that the change of tack signalled by *Post Danmark* will be continued in future abuse of dominance cases. The forthcoming decision of the court in *Intel* should act as a marker of the progress of this change, hopefully confirming the growing acceptance and, indeed, necessity of the adoption of an effects-based analysis in the enforcement of European abuse of dominance law. For those jurisdictions that have drawn heavily on the European legal framework in the creation of their own systems for the regulation of abuse of dominance, most notably India and China, further lessons concerning the need to abandon the *per se* approach and adopt an effects-based approach should be taken from the recent European experience.

On both sides of the Atlantic, the European and FTC Commissioners have, when dealing with the practicalities of abuse of dominance enforcement, in some cases shown a laudable willingness to find practical solutions in fast-moving markets. The growth, in particular, of the innovative use of consent decrees in the United States and commitment decisions within the European Union, is to be welcomed. These settlement tools create advantages for both competition authorities and market parties in reducing not only the regulatory and enforcement burden but in cutting the timelines for cases from up to 10 years (resulting in remedies that may be too late to keep pace with developments in the market) to periods of months or a few years. At the same time, we cannot ignore the fact that the use of such settlement procedures also brings some disadvantages for the development of the law; in an area where there are limited numbers of decisions, a lack of new precedents or guidance is of some concern.

As highlighted by the European Court of Justice in *Alrosa*,[9] settlement procedures may afford competition authorities a wide degree of discretion in the resolution of abuse of dominance cases. Especially given the absence of any in-depth judicial analysis of commitments, this discretion must be exercised with care and responsibility. The factors mentioned above may drive the Commission into adopting adventurous and novel interpretations of the law, and compel companies to agree to settlements to refrain from energetic rivalry that could, in fact, harm the interest of consumers.

Despite the scope for a harmonisation of approaches, there will probably never be total convergence between the law and practice governing the regulation of abuse of dominance in the United States and the European Union or, more generally, on a worldwide basis. There are some important differences between the relevant provisions of US and EU law. As can be seen in the different analysis of the *Rambus* 'patent trap', the respective concepts of 'monopolisation' (which does not require a dominant position at the time the offensive conduct occurs) and 'abuse' (which requires a finding of dominance) can lead to very different assessments of the same conduct.[10] The total lack of a concept of an exploitative abuse in US law is another fundamental difference. The purpose of

8 Ibid., paragraph 45.

9 Case C-441/07P, *Commission v. Alrosa Company Limited* ('*Alrosa*'), judgment of 29 June 2010.

10 *Rambus Inc v. FTC*, 522 F.3d 456 (D.C. Cir 2008) and Case COMP/ 38.636 *Rambus Inc*.

this book, as shown by the contributions it contains, is to allow for the beginning of an understanding of the differences and similarities, and their implications, between laws governing unilateral conduct in some of the major competition jurisdictions of the world.

In the coming year, there are likely to be further interesting case law developments, notably from the technology and energy sectors, areas that have been the subject of increased scrutiny by competition authorities. Of particular note will be the forthcoming decisions from the European General Court in *Intel*[11] and of the European Commission in *Samsung*[12] and *Motorola*.[13] More generally, both patent trolling and privateering are likely to come under increased scrutiny from not only the US and EU competition authorities but, probably, the competition authorities in many of the jurisdictions analysed in this book. Watch this space.

I would like to thank all of the contributors for taking time away from their busy practices to prepare their insightful and informative contributions to the inaugural edition of *The Dominance and Monopolies Review*. I am personally grateful for the invaluable assistance of my colleague Max Kaufman of the Brussels office. I look forward to seeing what 2013 holds for future editions of this work.

Maurits Dolmans
Cleary Gottlieb Steen & Hamilton LLP
London
June 2013

11 T-286/09 *Intel v. Commission*.

12 Case COMP/39.939 *Samsung – Enforcement of UMTS standards essential patents*.

13 Case COMP/39.985 *Motorola – Enforcement of GPRS standard essential patents*.

Chapter 21

SWITZERLAND

Nicolas Birkhäuser and Andreas D Blattmann[1]

I INTRODUCTION

In addition to the prohibition of unlawful agreements affecting competition (Article 5 of the Cartel Act, 'CartA'), and the control of mergers (Article 9 et seq. CartA), the control of the behaviour of dominant undertakings pursuant to Article 7 CartA is one of the three basic pillars of Swiss cartel law. According to Article 7, paragraph 1 CartA, dominant undertakings behave unlawfully when as a result of abusing their position on the market they hinder other undertakings from starting or continuing to compete or disadvantage trading partners (i.e., the opposite side of the market). Article 7, paragraph 2 CartA then stipulates which practices can be considered to be unlawful within the meaning of paragraph 1:

a any refusal to enter into business relationships (e.g., refusal to sell or purchase goods);
b the discrimination of trading partners in relation to prices or other commercial terms;
c the imposition of unreasonable prices or other business conditions;
d the undercutting of prices or other business conditions directed against other specific competitors;
e the limitation of production, sales or technical developments; and
f any conclusion of contracts on the condition that the contracting partners accept or provide additional services.

Article 7 CartA is consequently split into a general clause (paragraph 1) and a non-exhaustive list of examples of potential abusive practices (paragraph 2), although even

1 Nicolas Birkhäuser is a partner and Andreas D Blattmann is an associate at Niederer Kraft & Frey Ltd.

where there is a practice referred to there, the preconditions of the general clause must also be met at all times.[2] Basically three preconditions arise as a result: (1) there must be a dominant market position of an undertaking that (2) abuses said position and thereby (3) hinders other undertakings from starting or continuing to compete or disadvantaging trading partners.[3] It is therefore not dominance as such that is sanctioned but the abuse thereof. Whether there has to be a causal nexus between the abuse and the dominance is still in dispute. Case law on the matter is divided; doctrine, in contrast, largely says that this nexus is needed.[4]

The term 'market dominance' is not defined in Article 7 CartA but in Article 4, paragraph 2 CartA. According to that, dominant undertakings are one or more companies in a specific market that are able as suppliers or buyers to behave to an appreciable extent independently of other market participants (competitors, suppliers or buyers). Also, the term 'undertaking' is not defined in Article 7 CartA but in Article 2, paragraph 1-bis CartA. According to this, undertakings are all buyers or suppliers of goods and services active in commerce, regardless of their legal or organisation form ('personal scope of application of CartA'). It follows therefrom that the focus must be solely on an economic understanding of the term 'undertaking' or on the entrepreneurial activity. Therefore this even covers undertakings that arise under public law, including private commercial companies that are part of a public body (e.g., the government, canton or commune).[5]

Article 7 CartA is often accused of lacking precision and specificity.[6] Effectively, the provision does need some interpretation. It is especially questionable whether the aspect of European compatibility (i.e., interpreting Swiss cartel law provisions in the light of EU competition law) can serve as aid to interpretation. With regard to the term 'imposition' in Article 7 paragraph 2 lit. c CartA, the Swiss Federal Supreme Court addressed this question fairly recently and denied it: the Cartel Act Amendment of 1995 had no particular European political background. It was true that the Swiss legislator, like the European regulator, chose the term 'imposition'. It cannot, however, be inferred from the fact that the terminology was the same that an identical regulation had necessarily been sought. For imposition to exist, according to Swiss law it is at least necessary that the other side of the market has nothing to counter the economic pressure that is based on the market dominance or cannot evade it.[7] Coercion arising merely from economic superiority or a causal nexus between the dominant position in the market and the unreasonable conditions, as is the view, for example, in European doctrine,

2 Borer, Swiss Cartel Act, Competition Law I, 3rd edition, Zurich 2011, Article 7 N 4.

3 Recht und Politik des Wettbewerbs ('RPW') [Competition Law and Policy], 2011/4, p. 525 Recital 28, although however the assumption might be that Clause 3 was already included in Clause 2.

4 Amstutz/Carron, in: Amstutz/Reinert (Hrsg.), Basel Commentary on the Cartel Act, Basel 2010, Article 7 N 19 ff., with notes [cit. BSK KG-Author, Article N].

5 BGE [Federal Supreme Court Decisions] 137 II 199, E. 3.1.

6 Borer (Fn 1) Article 7 N 7, with notes; RPW 2010/2, p. 267 E. 4.5.1.

7 BGE 137 II 199, E. 4, in Re Swisscom – mobile telecommunications termination charges.

is consequently not sufficient.[8] Whether this is set in stone is still not clear. The Swiss Competition Commission ('ComCo'; if not further specified, this definition includes the Swiss Competition Commission and its Secretariat) accuses the Federal Supreme Court, however, of simply overlooking the criterion of compatibility with European law in the documents relating to the Cartel Act Amendment.[9]

Article 3, paragraph 1 CartA lastly governs the relationship of the CartA to other legal regulations: in applying the CartA, regulations are reserved that do not permit competition, in particular those that establish a state market and price system or give individual undertakings special rights to enable them to fulfil public duties. Not every regulatory intervention is, however, a fully comprehensive market and price system. Instead, the extent of the intervention must be established in each individual case. Only if the legislator actually intended to create an integrated market and price system and thereby a restraint of competitive freedom can the reservation in Article 3, paragraph 1 CartA be assumed to apply to the entire market.[10] Article 3, paragraph 2 CartA finally stipulates that effects on competition that arise exclusively from the legislation on intellectual property do not fall under the CartA. Import restrictions that are based on intellectual property rights are, on the other hand, assessed under the CartA.

II YEAR IN REVIEW

i Overview

In past years ComCo focused primarily on the opening of the Swiss market or on preventing markets from being foreclosed through agreements affecting competition. However, the assumption must be that in future the focus will increasingly also be on the circumstances described in Article 7 CartA. In late 2012, for instance, an investigation was opened against three companies in the Galenica Group, which were allegedly attempting to force their partners to continue to enter into business relationships. In addition, in the spring of 2013 a probe was begun in the area of the transmission of live sport on pay-TV since there were alleged to be indications of abusive practices, namely based on long-term and comprehensive exclusive rights.

ii Distribution of tickets in Zurich's Hallenstadion

In addition, in 2012 three cases relating to Article 7 CartA were published. The first case concerned a contractual clause of the Hallenstadion Zürich, one of the largest multi-purpose or event stadiums in Europe, under which event organisers were obligated to distribute at least 50 per cent of the tickets through a distribution channel specified by Hallenstadion; for practical reasons this clause acted as a 100 per cent commitment.[11] ComCo examined whether this obligation constituted an imposition of unreasonable business conditions. Following a definition of the market, it came to the conclusion that

8 See also RPW 2010/2, p. 321 ff., in particular E. 12.2.1.

9 RPW 2011/4, p. 586 Fn 394.

10 Borer (Fn 1) Article 3 N 5; RPW 2012/3, p. 461 Recital 19.

11 RPW 2012/1, p. 74 ff., in particular p. 94 ff.

Hallenstadion did indeed have a strong market position. Based on the market structure there was, however, said to be currently no indication that Hallenstadion could behave to an appreciable extent independently on the relevant market as defined in Article 4, paragraph 2 CartA. It also found that there was no economic dependence, since the economic significance of what the event organisers in Hallenstadion were required to do was too small in relation to their overall business activity. Because of the absence of market dominance, ComCo therefore did not have to investigate whether the contractual clause was abusive conduct pursuant to Article 7, paragraph 2 lit. c CartA. Given the latest case law on 'imposition' this is unfortunate.

iii Erdgas Zentralschweiz AG

A second case concerned an undertaking in the natural gas transmission and trading business with its own high pressure pipeline network carrying natural gas to the local utilities, which are simultaneously shareholders of the company in question, and also to third parties. There was an investigation into whether the conduct of the company in requiring shareholders to pay lower user fees than third parties meets the factual criteria of discrimination of trading partners in relation to prices.[12] The first thing to be clarified was whether in the area of natural gas storage and transmission there is a state market or price system within the meaning of Article 3, paragraph 1 lit. a CartA, since the market is at least partially regulated by the Federal Act on Pipelines for the transmission of liquid or gas fuel or propellant, namely by means of an obligation on pipeline operators to contractually assume transportation for third parties in exchange for an appropriate consideration. If the parties cannot agree on the appropriate consideration, the Swiss Federal Office of Energy ('SFOE') shall decide. In the view of ComCo, these regulations cannot, however, establish a state market or price system. The fact that the parties had to negotiate first and that a government decision would only be made in the event of a dispute shows that the legislator has given precedence to contractual freedom rather than government intervention. Nothing is changed by the decision-making authority of the SFOE in a disputed case. This merely results in a decision being made in an individual case but does not lead to there being a generally applicable ordinance relating to rates. Finally, ComCo stated that the unequal treatment cannot be justified since shareholders would already be compensated for assuming the economic risk and financing the network through their participation in the profit (i.e., through the payment of dividends). Any improvement in the situation of the shareholders beyond this cannot consequently be justified by this line of argument, which is why there is unlawful behaviour as defined in Article 7, paragraph 2 lit. b CartA.

iv Debit cards

In a third case the assessment was of a debit card system ('Maestro') and the associated fees. It was found that Maestro was the only international four-party debit card system available in Switzerland. Maestro therefore had a market share of 100 per cent. Thus, it was important whether the contractual obligation to pay the respective fees set by

12 RPW 2012/3, p. 459 ff.

Maestro could be classified as an imposition of unreasonable prices pursuant to Article 7, paragraph 2 lit. c CartA. Because there was no possibility of avoiding Maestro, the criterion of 'imposition' was considered to be met, and so ultimately the unreasonableness of the three charges in all had to be examined. One of them was a licence fee. In this regard ComCo held that Maestro did not use its strong market position to set a higher licence fee in Switzerland than in countries in which Maestro was exposed to stronger competition (the fee was the same throughout the whole of Europe), and so it was not unreasonable. The same applies to the second fee (fee levied on the domestic turnover): this is fully reinvested by Maestro by financing certain innovation projects in the debit card system, for example to improve the current terminal infrastructure for traders. This was accepted as justification: the high penetration (90 per cent of the adult population) did not rule out economically reasonable innovations and their 'centralised' promotion was financially expedient. In addition, the fee was relatively low. On the other hand, there was a different initial position for the third fee (the interchange fee). According to Maestro, the purpose of that fee was to expand and optimise the debit card system. The accusation made against that was that the extremely high market penetration does not justify an additional fee for extending and optimising the system. It was therefore classified as unreasonable or abusive within the meaning of Article 7, paragraph 2 lit. c CartA.[13]

III MARKET DEFINITION AND MARKET POWER

i Basic principles

An undertaking is dominant according to Article 4, paragraph 2 CartA if it can to an appreciable extent behave independently of other market participants (competitors, suppliers or buyers), although the note in parentheses is to make it clear that in determining where there is a market dominant position the focus must not simply be on data relating to market structure but there must also be an examination of the actual relations of dependence on the market. Therefore market dominance may also exist if an undertaking has a paramount market position in relation to competitors or if other undertakings as buyers or suppliers are dependent on the first undertaking (relative market dominance).[14]

To assess whether an undertaking is dominant, in practice an analysis must be made of the situation of the competitors (current competition), the market entry barriers (potential competition) and the position of the other side of the market. ComCo practice is essentially in accordance with that of the European Commission, whereby the following factors must be checked: (1) the competitive pressure or market position of the dominant undertaking and its competitors; (2) the competitive pressure due to the imminent expansion of already existing competitors or the imminent market entry of potential competitors; and (3) the competitive pressure due to the negotiating strength

13 RPW 2012/4, p. 749 ff. and p. 764 ff.

14 Borer (Fn 1) Article 4 N 16, with notes.

of the buyers (countervailing market power).[15] Analysing these criteria requires the relevant market to be defined in terms of product, geography and time. In terms of product, the market comprises all goods or services that are regarded as capable of being substituted by the other side of the market with regard to their characteristics and their intended purpose. The geographically relevant market comprises the territory in which the other side of the market is the buyer or supplier of the goods or services comprising the product market. In defining the relevant market in terms of product and geography, ComCo applies Article 11, paragraph 3 of the Merger Control Ordinance by analogy.[16] In terms of time, an examination must be conducted to see whether any goods or services that allow for substitution in terms of product and geography are available all year round or just for a certain period.

The first guide that must be used is certainly market share: if the share is below 20 per cent a dominant position can generally only be said to exist if, based on the market structure, no effective countervailing power can be created (i.e., so that neither current nor potential competitors or the other side of the market can have a disciplinary effect). Even market shares of between 20 and 40 per cent do not automatically mean there is market dominance. Once again, additional indicators are needed of the actual existence of independence. Only when it comes to market shares of 50 per cent and more should it therefore become critical, although here too the market position must be examined in detail. Based on the wording in Article 4, paragraph 2 CartA, it is also clear that market dominance may exist not only on the supply side but also on the demand side.

It has not yet been completely clarified whether market dominance must be said to already exist when, in respect of a specified product, no alternative is possible in that a trader has to offer this product to end customers or else they would look for another trader ('must-in-stock' products or product-range dependence as a subset of relative market dominance). This is significant to the extent that the relevant product market might be limited to this product, which would automatically result in a monopoly. In actual fact, ComCo has in a few decisions affirmed the existence of 'must-in-stock' products. However, this topic is still a hot potato and much debated in legal writings.[17]

ii Collective dominance

According to Article 4, paragraph 2 CartA, market dominance can be exerted not only by a single undertaking but by a number of undertakings collectively. Two different scenarios can be distinguished: either the collective market dominance of two or more undertakings is the result of an agreement affecting competition (here Article 5 and Article 7 CartA may apply cumulatively) or it is the consequence of the market structure.

As far as is evident, collective dominance has so far been affirmed only once in an investigation under Article 7 CartA. During that process ComCo gave an opinion, at

15 RPW 2012/1, p. 98 Recital 133.

16 RPW 2012/1, p. 103 Recital 158 and p. 105 Recital 170.

17 C.f. instead of many others Thomi/Wohlmann, Must-in-Stock-Products – Die Erweiterung des Begriffs der Marktbeherrschung [the expansion of the term 'market dominance'], in: SZW/RSDA 4/2012, p. 299 ff.

least indirectly, on the interesting issue of whether all collectively dominant undertakings would have to act jointly or in the same way, or whether it is enough if just a single undertaking acted abusively. The case concerned a contract clause that could be found in the contracts of all dominant undertakings. The analysis revealed a market that was structured as an oligopoly with high market transparency, a constant market phase, a negligible risk of potential competition and strong product homogeneity. The dominant undertakings were as a result able to anticipate their mutual practices, which enabled them to behave in parallel naturally, and none of the dominant undertakings had an incentive to deviate from the parallel behaviour, in particular with regard to the contract clause in question. From the point of view of the other side of the market, there were accordingly no differences between the various suppliers. On the contrary, they presented themselves as a single entity on the market.[18] That it must be the behaviour of all dominant undertakings appears, therefore, appropriate. Collective dominance is often the product of a parallel behaviour that is a result of the market structure. The initial position for collective dominance is consequently a joint behaviour, though not coordinated as defined in Article 4, paragraph 1 or Article 5 CartA. This parallel behaviour must be examined to see if it is abusive. Exceptionally, the individual behaviour of a collectively dominant undertaking can be termed abusive within the meaning of Article 7 CartA if that behaviour serves at the same time to maintain collective dominance on the market. It is unclear whether this means there is a difference from European practice. It is true that European case law decided in one of the admittedly rare cases of vertical collective dominance that the behaviour of a single undertaking was sufficient.[19] However, this is somewhat problematic (at least) in cases of horizontal collective dominance since the buyer might shift to another collective dominant undertaking whose behaviour is not abusive. However, then the buyer is not dependent on the undertaking with the abusive behaviour: that undertaking cannot behave independently – its behaviour might be disciplined by the buyer switching to the competitor.

iii Intellectual property

Article 3, paragraph 2 CartA says that CartA does not apply to effects on competition that arise exclusively from the legislation governing intellectual property. The question of the extent to which this provision excludes effects on competition from the CartA also concerns the contentious relationship between intellectual property law and cartel law. A few years ago, ComCo held that Article 3, paragraph 2 CartA only covered effects on competition based on actions of the protected rights holder that would arise themselves from the relevant enactment of the intellectual property law. Any contractual extension of absolute protected rights would in contrast fall within the ambit of the CartA.[20] However, this is not firmly established practice. Instead, it is highly probable that Swiss

18 RPW 2003/1, p. 134 f. and p. 150 f. Recital 241 f.; the probability of the emergence of collective market dominance is moreover regularly taken into consideration in relation to the future, hypothetical structure of the market during examination of corporate mergers.

19 See the notes in Whish, *Competition Law*, Seventh Edition, Oxford 2012, p. 581 f.

20 RPW 2006/3, p. 433 ff.

practice will ultimately follow EU practice: consequently, a distinction must first be made between the existence and the exercise of intellectual property rights. However, because the existence of rights cannot be considered separate from their exercise the substantive extent (scope) of the right frequently only arises once it is exercised. Exclusive rights that are only exercised with regard to a restraint on competition are assessed under the Cartel Act.[21]

In connection with Article 7 CartA, intellectual property law is primarily of significance when it comes to 'compulsory licences'. The question is whether a refusal to grant intellectual property law licences constitutes a refusal to enter into business relationships (Article 7, paragraph 2 lit. a CartA). This is primarily relevant if the licence or the intellectual property represents a 'facility' that is essential for providing specific services or for manufacturing specific products; another market participant is consequently reliant on the licence ('essential facilities'). Refusing to grant a licence for intellectual property is, however, not in itself abusive. Rather, in addition to Article 7, paragraph 1 CartA it is necessary that refusing the licence prevents a development that benefits consumers, such as a new product, the creation of which requires the licence for the intellectual property. Following European practice, this will only be answered in the affirmative if the undertaking asking for a licence does not intend to restrict itself to copying or duplicating the products or services of the dominant undertaking but wishes to produce or offer for sale a new product or a new service to satisfy a potential demand, in which case innovation potential that is sufficiently recognisable will be enough.[22]

IV ABUSE

i Overview

The list of examples in Article 7, paragraph 2 CartA does not provide for exhaustive preconditions. Even where there is such a behaviour, the preconditions of Article 7, paragraph 1 CartA must therefore be met.[23] Furthermore, Article 7 CartA, in contrast to Article 5 CartA (see paragraph 2 there), does not contain any statutory justification of abuse. However, even with Article 7 CartA, justification is generally possible ('legitimate business reasons').[24] As in European law, a distinction is generally made between the factual elements of impeding (excluding) and exploiting. Isolated practices in the list of examples in Article 7, paragraph 2 CartA are similar to those defined in Article 102 of the Treaty on the Functioning of the European Union ('TFEU'). In addition, Article 7, paragraph 2 CartA, however, does recognise other presumably abusive practices.

ii Exclusionary abuses

Refusal to enter into business relationships is again controversial. In fact, Article 7, paragraph 2 lit. a CartA does not prohibit the dominant undertaking from organising

21 See also Borer (Fn 1) Article 3 N 11, with references to European practice.

22 BSK KG-Amstutz/Carron, Article 7 N 148.

23 Zäch, *Swiss Cartel Law*, Second Edition, Bern 2005, Recital 526 ff.

24 See also BSK KG-Amstutz/Carron, Article 7 N 57.

its sales or purchase practice selectively. This provision consequently does not justify a general obligation to contract. This is only the case if the refusal cannot be based on objective justifications. These are frequently found in the area of transaction costs, or, for example, if the business partner behaves unreliably. It is also worth noting that the term 'refusal' includes breaking off, restricting or changing, and not entering into business relations. The breaking off or restricting of a business relationship is frequently evaluated more strictly than failing to enter into such relations.

As has been shown, in 2012 ComCo also dealt with the discrimination of trading partners (see Section II.iii, *supra*). Article 7, paragraph 2 lit. b CartA covers discriminatory practices of any kind, although the term 'business conditions' must be interpreted broadly. These include supply terms (e.g., relating to time) or the quality of the goods delivered. Dominant undertakings are bound by the equal treatment rule. There can therefore be discrimination first where the same subject matter is treated differently but also where there is the same treatment of disparate subject matter. No discrimination therefore exists if the practice of the dominant undertaking can be justified on objective grounds, for example, different transport or sales costs or different economies of scale (although the prices or business conditions can, even then, still be deemed to be unreasonable within the meaning of Article 7, paragraph 2 lit. c CartA). Nor does the prohibition against discrimination stop at the door of the group or other economic ties. A dominant undertaking is instead required to treat both upstream and downstream competitors the same as it would treat economic entities 'belonging to' it. Discriminatory practices as a means of impeding other companies are often subtle, for example, the practice of granting traders varying degrees of financial support or providing them with special offers. In contrast, loyalty discounts to retain its own traders or in order to hinder the competitors are more obvious.[25]

Discount schemes are also of importance in the targeted undercutting of prices or other business conditions. Article 7, paragraph 2 lit. d CartA consistently says there must be a price reduction or the offer of favourable business terms. However, what is required is targeted undercutting. Unlike general price reduction, price undercutting is therefore directed against individual competitors ('predatory pricing'), which, however, does not rule out a general price reduction. The purpose of such a practice is generally to force a weaker competitor out of the market, so that the gap that has arisen as a result can be filled and the price raised above the usual level. There is an indication of targeted price undercutting if the income can no longer support the undertaking's own marginal costs over the long term and they cannot be offset even on another market. On the other hand, there is no abusive behaviour if despite the gap there is still sufficient competition and therefore the price cannot be raised on the market in question or on another market above the level of the competition price. Consequently the initial position in Swiss law is somewhat less clear than in European law, which always assumes there are abusive prices if they are below the average variable costs.[26] In assessing contracts, the specific focus is on what are known as English clauses. Under this kind of clause, a contracting

25 Zäch (Fn 23) Recital 673 ff.

26 Borer (Fn 1) Article 7 N 24.

party (buyer) is promised, upon disclosing a competing offer, that its own prices will be set lower than those of the competitor. Such clauses may not only promote targeted undercutting (Article 7, paragraph 2 lit. d CartA) but may also be unreasonable (Article 7, paragraph 2 lit. c CartA). Price undercutting using discount schemes is less obvious. A discount scheme is, for instance, unlawful if it is tied to the sales of the products of the party granting the discount in relation to competing products: this is the case when discounts are not graduated based on total volume of purchases but are computed according to whether a trader covers a fairly large share of its aggregate requirements using one single supplier.[27] In these cases contract clauses can generally also be found that obligate the purchaser to disclose the sales figures for the competing products.

Limitation of production, sales or technical developments refers to the artificially induced shortage of goods with the goal of driving up prices or maintaining them at a high level (to the detriment of the consumers). Article 7, paragraph 2 lit. e CartA must be given a wide interpretation and covers the dominant undertaking's limitation in relation to itself and the limitation created in relation to third-party companies. The latter can, for instance, happen through exclusive contracts or through relationships regarding distribution and use. The limitation can, however, be justified if its purpose is to protect distribution targets. It is critical, however, when its aim is to impede competitors or split up markets.

iii Exploitative abuses

The imposition of unreasonable prices or other unreasonable business conditions under Article 7, paragraph 2 lit. c CartA does not directly apply to the price-setting mechanism. It only applies when the interplay of supply and demand is adversely affected. Low or high prices are not unreasonable in and of themselves but rather when they are clearly unfair or disproportionate and can be imposed by the dominant undertaking. According to case law, price abuse exists for example if a party with a monopoly abuses its position in order to impose exploitative ('extortionate') prices on the buyer, in the knowledge that the buyer – because of the monopoly – has no feasible alternatives if he or she wants or has to have his or her need for the product met through the monopolist. The other side of the market consequently has nothing to counter the economic pressure caused by the dominance or cannot avoid it. This is assessed based on the current competition and the market entry barriers. Establishing whether the price or the business conditions are unfair or unreasonable is, however, a hard thing to do. Unreasonableness can, for example, be assessed using market comparisons or cost methods, while determining unfairness requires consideration of the interests of both the dominant undertaking and the trading partners.[28]

In the case of transactions subject to conditions within the meaning of Article 7, paragraph 2 lit. f CartA, the dominant undertaking makes the contract being entered into conditional upon the contracting partner having to accept or provide additional services that have no relation to the subject of the contract either in terms of the subject

27 Zäch (Fn 23) Recital 687, with reference to case law.

28 RPW 2004/3, p. 798.

matter or according to commercial practice. For example, the purchase of a machine is tied to the purchase of the paper to be processed by the machinery. Unlike Article 102, paragraph 2 lit. d TFEU, this applies to dominant buyers as well as dominant suppliers. Transactions subject to conditions are generally used to extend the dependence of the other side of the market on one market to another one. They adversely affect the freedom of the contracting party, alter the competitive situation with regard to the additional service and are therefore considered to be anti-competitive. Whether an additional service can be sufficiently differentiated from the principal service is something that is decided based on whether the tied services have their own markets. Assessing this under cartel law is not problematic when the tie-in is obvious. As well as actual pressure, enforcement can, however, also be by means of positive incentives (indirect tie-in), which makes it harder to assess under cartel law. Even transactions that are subject to such conditions can be justified provided they are proportionate and there are good arguments for them in terms of objectively persuasive technical or economic reasons or generally recognised commercial practice (substantive connection; 'legitimate business reason'). Finally, general grounds of justification, such as consumer protection, avoidance of product liability or warranty of safety of use, come into question.[29]

V REMEDIES AND SANCTIONS

i Sanctions

Pursuant to Article 49a, paragraph 1 of the CartA, any undertaking that abuses a dominant position will be sanctioned with a penalty of up to 10 per cent of the turnover achieved in Switzerland in the preceding three financial years (cumulatively); this is not limited to the relevant markets. Furthermore, Article 3 of the Cartel Act Sanctions Ordinance ('CASO') provides that, depending on the seriousness and nature of the infringement, the basic amount of the sanction (the floor for calculating the sanction) may amount to a maximum of 10 per cent of the turnover achieved by the undertaking in the relevant markets in Switzerland during the preceding three business years. Starting from the basic amount of the sanction, various factors are relevant in determining the sanction, some of which are aggravating and some of which are mitigating (Articles 4 to 6 of the CASO): the duration of the infringement, the repetition of an infringement, the amount of the profits, the (leading) role of an undertaking (also with respect to retaliatory measures) or the fact that an undertaking does or does not cooperate with ComCo or attempts to obstruct the investigations in any other manner. According to Article 6 of the CASO, if there are mitigating circumstances, the amount of the sanction may be reduced. The list of mitigating circumstances according to Article 6 of the CASO is not exhaustive. In particular, cooperation outside a leniency application and the conclusion of a settlement with ComCo may also lead to a reduced sanction. Please see Section VI, *infra*, with regard to the full and partial waiver of a sanction in the case of leniency applications as well as with regard to discounts where settlements are concluded and in the case of cooperation with ComCo. Finally, it must be noted that only undertakings can be

29 Zäch (Fn 23) Recital 707 ff.

sanctioned for first-time infringements against the substantive law provisions. Natural persons, such as employees, who are subject to criminal sanctions, cannot be sanctioned for first-time infringements of these provisions, but only for infringement of amicable settlements and administrative orders and certain other infringements, which are subject to fines up to 100,000 Swiss francs (Articles 54 to 55 of the CartA).

The Federal Supreme Court recently gave its opinion at least to some extent on the important question of whether Article 7 CartA was sufficiently clear and whether the consequences of a party's own actions are foreseeable as a result. This is important for the very reason that principles of constitutional and international law require that only a law that is worded sufficiently clearly and specifically can create the constituent elements of a crime and can result in the imposition of a penalty (*nulla poena sine lege*). The same applies to the sanction under Article 49a CartA, which, given this background, is considered to be a penalty. The court of previous instance, prior to the Federal Supreme Court, the Federal Administrative Court, found that at least the general clause, because it was open-ended, was not a sufficient basis for a sanction to be imposed pursuant to Article 49a CartA. This was said to only be possible if the general clause was applied together with an offence from the list of examples.[30] The Federal Supreme Court, following intense deliberation and by a majority of three votes to two, agreed with the Federal Administrative Court's view that at least the list of examples is sufficiently specific. However, it deliberately left unanswered the question of whether the general clause itself is sufficiently specific. However, it did hold that even 'criminal laws' required interpretation, and that it is indeed the duty of the courts to remove any remaining doubts regarding interpretation.[31]

ii Behavioural and structural remedies – interim measures

ComCo proceedings generally consist in a preliminary investigation and a (regular) investigation. Under Article 30 CartA, the proceedings end with a decision by ComCo in which 'measures' may be ordered. This provision, however, is not a statutory basis for all appropriate measures. Apart from corporate merger control, ComCo generally does not have jurisdiction to order structural measures. Nor does the CartA provide for general jurisdiction to enact behavioural measures for practices specified in Articles 5 or 7 CartA. 'Measures', according to Article 30, paragraph 1 CartA, essentially means that ComCo may make orders to eliminate any restraint on competition that may still exist. The result is that measures must consist in injunctions to take concrete steps or to cease and desist from doing something (i.e., a prohibition against continuing to practise the behaviour that has been found to be unlawful, or a positive injunction to initiate or implement specific measures aimed at eliminating the unlawful behaviour). ComCo may therefore order that a party cease and desist from an unlawful practice that has actually been found. It may consequently, for example, order a contract to be entered into if refusal to enter into a business relationship has been found to be unlawful. Measures relating to practices that are outside cartel law (i.e., that were not the subject of

30 RPW 2010/2, p. 314, E. 4.5.

31 BGer 2C_484/2010, E. 2 and 8.2.

a proceeding or were not found to be unlawful) may not be ordered. In addition, orders must at all times be reasonable.

If, after the preliminary investigation, an investigation is opened there is the possibility, within the meaning of interim measures, to make certain orders for the duration of the proceedings. With regard to Article 7 CartA, it can, for example, be ordered that an allegedly dominant undertaking must continue to supply other market participants during the proceedings. For example, ETA, a subsidiary of the Swatch Group, which had announced that it was suspending deliveries of mechanical movements that were important to the whole watch industry, was obligated to continue making such deliveries to a certain extent.[32] It is true that the CartA has no express rule regarding interim measures, but based on the reference in Article 39 CartA to the Federal Act on Administrative Procedure, which has a corresponding provision, they are permitted.[33] Interim measures may also be applied for by third parties provided that not only individual interests, which must be asserted in the civil courts, but also the public interest in protecting effective competition are affected. The precondition for ordering interim measures is that it can be ruled out with sufficient certainty that there are objective reasons for the allegedly unlawful behaviour that is to be investigated. Furthermore, the order must be reasonable. ComCo decisions concerning interim measures may be challenged independently in the Federal Administrative Court if they result or may result in a disadvantage that cannot easily be rectified (particularly of a financial kind).

VI PROCEDURE

A government cartel investigation is often an unpleasant surprise. A swift, effective, and well-coordinated response is essential. The first step of every proceeding is the opening of a preliminary investigation according to Article 26 CartA through the Secretariat of ComCo. Usually, the Secretariat of ComCo gathers information by sending questionnaires. If it comes to the conclusion that there are indications of an unlawful restraint of competition (or if the Secretariat of ComCo believes it has a good case from a political perspective), an investigation will be opened according to Article 27 CartA. The opening is published in the Swiss Official Gazette of Commerce and, generally, in a press release. ComCo, or its Secretariat, may also comment on an investigation in interviews, on television or in a press conference (depending on the public interest and response), which makes an undertaking's preparations in responding to such media coverage and to questions of the media very important. Furthermore, the Secretariat of ComCo has the power to search any premises, including business premises, private addresses and adjacent areas. Therefore, an investigation can open with a dawn raid at the premises of the undertakings being searched. The Secretariat of ComCo is usually accompanied by an official, the police and IT experts, and it may seize any evidence. The undertakings and their employees must provide the Secretariat of ComCo with the documents that it requests and grant access to everything. Questions that are related to the dawn raid must

32 RPW 2012/2, p. 260 ff.

33 BGE 130 II 149, E. 2.1; RPW 2012/1, p. 164.

be answered (e.g., regarding the location of documents, the archive system or passwords). ComCo recently took the view that evidentiary hearings and witness examinations can take place during a dawn raid, which is disputed by part of the doctrine and has, to our knowledge, not yet been tested before the courts. However, there is no obligation to actively assist the Secretariat of ComCo with the dawn raid. The undertaking should appoint a dawn raid team responsible on the company side for coordinating and monitoring any dawn raids and undertakings should always be prepared for dawn raids.

If an investigation is opened (regardless of whether there is a dawn raid), the Secretariat of ComCo will usually grant a deadline of approximately 30 days to answer (further) questions or to submit a statement regarding the allegations, or both (the deadlines in the preliminary investigation are usually shorter, approximately seven to 14 days). If the Secretariat of ComCo opens an investigation and upholds its position that there are unlawful restraints of competition, there will normally be a hearing before the Secretariat of ComCo. One of the purposes of hearings is to grant undertakings the right to be heard. However, in practice, the primary reason is to allow the Secretariat of ComCo to investigate and establish the facts that will be used as evidence against the undertakings. Even though ComCo has the statutory power to require the parties to an investigation to give evidence, the parties may, within certain limits, refuse to answer questions if this would result in self-incrimination (due to the procedural rights of the parties). In any event, undertakings must determine and prepare very carefully what information and documents are to be submitted and how this is to be done.

During the proceeding, there is the possibility of reaching an amicable settlement with ComCo or submitting a leniency application. Pursuant to Article 49a, paragraph 2 of the CartA, a sanction may be waived in whole or in part if the undertaking assists in the discovery and elimination of the restraint of competition. Although the CASO stipulates a full or partial waiver of fines only in cases of horizontal and vertical agreements according to the CartA, it may be assumed, based on the wording of Article 49a CartA, that a waiver is also possible in case of unlawful practices by dominant undertakings under Article 7 provided, however, that the following conditions are fulfilled. According to Article 8 of the CASO, ComCo may grant an undertaking full immunity from a sanction if the undertaking reports its own participation in a restriction on competition and if it is the first applicant to provide (1) information that enables ComCo to open proceedings, or (2) evidence that enables ComCo to establish an infringement of competition (provided the information or evidence is not already available). A leniency application may lead to (1) a discount of 100 per cent of the sanction (immunity) if the undertaking is the first applicant and meets certain conditions, or (2) a discount of up to 50 per cent if the undertaking is not the first applicant but does meet the respective conditions, depending on how much that undertaking contributed to the success of the proceedings. However, full immunity from sanctions is granted only if several conditions are met, such as that the undertaking has not coerced any other undertaking into participating and has not played the instigating or leading role in the relevant infringement of competition. Since a dominant undertaking can always be considered to having a leading role, full immunity would probably be the exception. Finally, entering into an amicable settlement, along with cooperation with ComCo, may, depending on the particular circumstances, lead to a discount of between approximately 5 and 20 per cent.

Cooperation outside a leniency application that goes further than demanded by ComCo can also lead to a reduction of the sanction. Even though there are explanations by ComCo stating that cooperation is only taken into consideration within a leniency application, part of the doctrine takes a different view and ComCo has adopted this other view at least in certain cases. Mere cooperation would probably be rewarded with a smaller discount than concluding a settlement with ComCo. It must be noted that there is no established practice by ComCo with regard to discounts. Therefore, the above amounts must be seen only as a tentative indication. Finally, the amounts of the reduction in the case of settlement or cooperation depend mostly on the facts. As a general rule, the earlier and the more substantively an undertaking acts, the higher the benefit may be.

After roughly one year from the opening of the investigation, the Secretariat of ComCo will send the parties a draft order stating the allegations, the position and the reasoning of the Secretariat of ComCo. Please note that the draft order can also be sent to the parties after less, or after significantly more, than one year from the opening of the investigation. This varies from case to case and also depends on the workload of the Secretariat of ComCo. The Secretariat of ComCo will usually grant the parties a deadline of 30 days to submit a statement in response to the draft order. This deadline can normally be extended. Based on the statement of the parties in response to the draft order, the Secretariat of ComCo may revise the draft order (and in case of substantial changes again send it to the parties) or submit the draft order together with the statements of the parties to ComCo for a decision. Within roughly two to four months, there will usually be a hearing before ComCo during which the parties have a right to be heard and can present their view of the facts and of the legal assessment and during which ComCo asks the parties questions with the aim of gathering evidence against the parties. After this hearing, the parties may be asked follow-up questions. If no substantial further investigations or changes are made, ComCo will usually issue its decision (order) within one to three months. ComCo's decisions may be appealed to the Federal Administrative Court and thereafter to the Federal Supreme Court.

VII PRIVATE ENFORCEMENT

Private antitrust enforcement has not yet played a significant role in Switzerland. Of course, reporting an abuse of a dominant position to ComCo is often a less risky way to put pressure on a dominant undertaking than seeking a judgment or a settlement in a civil proceeding. Notwithstanding this hesitant development, there are specific provisions in the CartA regarding private enforcement. Pursuant to Article 12 CartA, a person hindered by an unlawful restriction on competition from entering or competing in a market is entitled to request the elimination of, or desistance from, the restriction, damages and satisfaction in accordance with the Code of Obligations ('CO'), and surrender of unlawfully earned profits in accordance with the provisions on agency without authority. Furthermore, pursuant to Article 41 CO, a person claiming damages must prove that loss or damage occurred. The level of proof that is required to claim damages is high; basically, any damages must be established based on the specific facts. Where the exact value of the loss or damage cannot be quantified, the court may estimate the value at its discretion in the light of the normal course of events and the steps taken

by the injured party. Furthermore, there are no punitive damages. Finally, it must be noted that leniency granted to an undertaking does not preclude the undertaking from being subject to private enforcement.

VIII FUTURE DEVELOPMENTS

The most significant future development would be an amendment of the CartA that has been proposed and is currently being debated and that would include several elements. First, the institutions may be revamped to include: (1) a (more) independent competition authority responsible for investigating potential infringements and for reviewing proposed concentrations (mergers); and (2) a new chamber of the Swiss Federal Administrative Court responsible for deciding on the matters brought before it by the competition authority. The aim of these new institutions would be to create more independence between the investigating and the decision-making body. It is currently unlikely that this will be realised. Second, a motion is pending and being debated according to which a new provision (Article 7a) may be introduced into the CartA so that undertakings distributing their products outside of Switzerland at lower prices than in Switzerland will be deemed to be infringing the CartA if they refuse to supply customers in Switzerland through their foreign distribution entities at the same prices and conditions, or if they take measures to prevent third parties from supplying to Switzerland. Third, compliance programmes of undertakings may result in reduced sanctions.

Finally, a cooperation agreement on competition has been negotiated between Switzerland and the EU. ComCo and the EC are convinced that many anti-competitive practices have cross-border effects on the Swiss and the EU markets and that a closer cooperation between the authorities will bring great benefits to both sides. The cooperation agreement must be approved by both the Swiss and European parliaments, and this is expected to happen. As the cooperation agreement concerns procedural law, it may be assumed that it would become applicable as of the date it comes into force, including with regard to ongoing proceedings.

Appendix 1

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Nicolas Birkhäuser is a partner at Niederer Kraft & Frey Ltd's competition law practice group. He graduated from the universities of Basel (lic iur, 1998) and Cambridge, UK (LLM, 2003). Further, he is a member of the Zurich and Swiss Bar Association and regularly publishes articles in various legal fields. Among others, Nicolas Birkhäuser acted as a national reporter for Switzerland at the 2012 Congress of the International League of Competition Law and as a speaker at an event of the Swiss section of the Studienvereinigung Kartellrecht e.V. in 2013.

Nicolas Birkhäuser advises and represents undertakings in competition law matters concerning in particular merger control, dominance, horizontal and vertical restraints, exchange of information, compliance, and competition enforcement investigations, including dawn raids and the risks and opportunities of leniency programmes. Nicolas Birkhäuser advises undertakings under Swiss and European competition law and coordinates with multi-jurisdictional strategies and responses. His aim is to achieve the best results in both public competition enforcement before competition authorities and courts as well as private competition enforcement and other aspects of the undertakings' strategy and defence.

One of the central themes of Nicolas Birkhäuser's advice is to elaborate solutions that create maximum freedom of action for the undertakings in each specific case.

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Andreas D Blattmann worked with several Swiss courts both as a senior clerk to the judges and as a judge. He primarly advises and represents clients in litigious and non-litigious competition law matters (such as merger control, compliance, dominance and monopolies, cartel enforcement investigations). Furthermore, he advises on contract law and unfair competition and represents clients before state courts, encompassing domestic and international commercial disputes, enforcement and insolvency.

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