The Intellectual Property and Antitrust Review

Fourth Edition

Editor
Thomas Vinje

The Law Reviews

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

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Thomas Vinje

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PREFACE

Intellectual property is taking a more and more central position in the global economy, and this is true not only in highly developed economies, but also in emerging ones. China and India, to take just two examples, are moving rapidly up the value chain and now have world-class technology companies for which intellectual property protection is crucial.

As the significance of intellectual property grows, so too does the relationship between intellectual property and antitrust law. Antitrust law constrains the exercise of intellectual property rights in certain circumstances, and both owners and users of intellectual property rights need to know how the two bodies of law interact and where antitrust draws lines for intellectual property. Intellectual property practitioners need to look beyond intellectual property laws themselves to understand the antitrust limits on the free exercise of rights.

The task of this book is, with respect to key jurisdictions globally, to provide an annual concrete and practical overview of developments on the relationship between antitrust and intellectual property. This fourth edition provides an update on recent developments, as well as an overview of the overall existing lay of the land regarding the relationship between the two bodies of law.

Key topics covered in this and future editions include the constraints imposed by antitrust on licensing, the circumstances under which a refusal to license intellectual property rights can be unlawful, the imposition of antitrust obligations on owners of standard-essential patents, the application of antitrust law to cross-border e-commerce, the growing importance of intellectual property issues in merger cases and the intense disputes regarding the application of antitrust law to patent settlements in the pharmaceutical industry.

As intellectual property continues to gain importance in the world economy, and as the number, resources and sophistication of antitrust authorities grows across the globe, new battles will be fought over the circumstances in which antitrust constrains intellectual property. Existing differences in the application of antitrust to intellectual property – already significant, and perhaps even greater than in intellectual property laws themselves – may grow, perhaps especially as more net intellectual property-consuming countries devote resources to antitrust enforcement. Future editions of this book will analyse these developments, and we hope the reader will find this to be a useful compilation and oft-consulted guide.

Finally, I would like to thank Ashwin van Rooijen and Axelle D'heygere for their important contributions to this fourth edition of *The Intellectual Property and Antitrust Review*.

Thomas Vinje
Clifford Chance LLP
Brussels
June 2019

Chapter 15

SWITZERLAND

Sevan Antreasyan, Benoît Merkt and Jürg Simon[1]

I INTRODUCTION

The Federal Act on Cartels and other Restraints of Competition (CartA) aims at preventing the harmful economic or social effects of cartels and other restraints of competition. It applies to unlawful agreements (vertical and horizontal), to abuses of dominant position and to control of mergers.

With respect to intellectual property, the following acts are the most relevant in Switzerland: the Federal Act on Patents for Inventions (PatA), the Federal Act on the Protection of Trade Marks and Indications of Source, the Federal Act on Copyright and Related Rights (CopA) and the Federal Act on the Protection of Designs.

None of the above-mentioned intellectual property acts deals with the relation between intellectual property rights and competition law. Article 3(2) of the CartA provides: 'This Act does not apply to effects on competition that result exclusively from the legislation governing intellectual property. However, import restrictions based on intellectual property rights shall be assessed under this Act.' The first sentence of this Article should, however, not be construed as providing an exemption to the application of the substantive provisions of the CartA. It is generally viewed as meaning that authorities applying the CartA in cases where intellectual property rights are at issue should take into account the relevant intellectual property acts.[2]

Article 6(1) and (2) of the CartA provide that the Federal Council or the Competition Commission (Comco) may adopt, respectively, ordinances or general guidelines to set out the conditions under which certain agreements shall, in principle, be deemed justified on grounds of economic efficiency. Article 6(1)(d) of the CartA refers specifically to 'agreements granting exclusive licences for intellectual property rights'. At present, no such ordinance or general guidelines have been adopted specifically in respect of intellectual property rights.[3] However, in deciding cases involving intellectual property rights, Swiss authorities usually consult the relevant EU guidelines.[4]

1 Sevan Antreasyan is an associate, and Benoît Merkt and Jürg Simon are partners at Lenz & Staehelin.
2 This restrictive approach has been confirmed by the Competition Commission; see DPC/RPW 2011/1, p. 113.
3 The Comco's general Guidelines on Vertical Agreements (the Vertical Agreements Guidelines; updated on 22 May 2017) may nonetheless be relevant for certain topics related to intellectual property rights agreements (e.g., licensing, distribution and franchising); see www.weko.admin.ch/weko/fr/home/documentation/communications---notes-explicatives.html.
4 See, e.g., the decisions B-463/2010 and B-506/2010 of the Federal Administrative Tribunal.

It is important to point out that, although they are not limitations *per se* imposed by competition law over intellectual property rights, the acts governing the latter provide for mandatory exceptions (i.e., exceptions that cannot be waived by contract), which have been enacted, for example, to protect research and development activities.[5] For instance, Article 9(1) of the PatA states that the effects of a patent do not extend to acts undertaken for research or experimental purposes to obtain knowledge about the subject matter of the invention, including its uses, acts necessary for obtaining marketing authorisation for a medicinal product[6] or the use of biological material for the purpose of the production or the discovery and development of a plant variety. With respect to software, Article 21 of the CopA provides a mandatory reverse-engineering exception for the purposes of obtaining interface information for the development, maintenance and use of interoperable software (insofar as neither the normal exploitation of the program nor the legitimate interests of the owner of the rights are unreasonably prejudiced).

II YEAR IN REVIEW

The past year was marked by several mergers in the media sector. Following on from the *Gaba/Gebro* case,[7] the Comco has rendered two decisions related to restrictions in the context of exclusive distribution networks.

Among the merger cases in the media sector,[8] it is worth noting that the Comco confirmed its practice according to which print and online advertising are part of the same product market, whereas it is justified to distinguish markets based on the subject matter of advertising (i.e., advertising for real estate, cars and jobs each constitute a separate product market).

In the *RIMOWA* case,[9] the Comco imposed a fine of approximately 130,000 Swiss francs on the German supplier for restricting sales of the contractual products by its German distributors to Switzerland. In another case,[10] the Comco recalled that restrictions on active sales outside the contractual territory, in the context of exclusive distribution agreements, are not unlawful under Swiss competition law. Further, the Comco decided that it is lawful for the supplier to redirect consumers' requests coming from Switzerland to the exclusive distributor of the products in Switzerland.

5 With respect to patents, see the Message of the Federal Council, FF 2006 1, p. 3.

6 By way of example, this limitation has the effect of allowing the producer of a generic to manufacture, import and store samples containing a patented active pharmaceutical ingredient (prior to the expiry of the patent) with a view to obtaining a marketing authorisation. This would allow the generic to enter the market faster after the expiry of the relevant patent. However, stockpiling the generic prior to the expiry of the relevant patent is unlawful.

7 FSC, 2C_180/2014 dated 28 June 2016.

8 See *AZ Medien/NZZ*, DPC/RPW 2018/4, 866 ff (mainly related to newspaper markets); *Tamedia/Basler Zeitung*, DPC/RPW, 937 ff (mainly related to newspaper markets) and *Tamedia/Tradono Switzerland*, DPC/RPW 2017/4, 579 ff (involving online and offline advertising markets).

9 *RIMOWA*, DPC/RPW 2018/2, 363 ff.

10 *gym80*, DPC/RPW 2018/2, 237 ff.

III LICENSING AND ANTITRUST

There are no specific rules or general guidelines governing licensing agreements under Swiss competition law. In this respect, the general rules of the CartA would be assessed in each particular case: under Article 5 of the CartA (unlawful agreements affecting competition) and under Article 7 of the CartA (unlawful practices of dominant undertakings).[11]

This chapter will not discuss the different rules on intellectual property rights exhaustion, to the extent that, pursuant to Article 3(2) of the CartA, the CartA is fully applicable to parallel import restrictions. However, as a matter of principle, international exhaustion applies to copyrights and trademarks; regional (i.e., countries of the European Economic Area (EEA) and Switzerland) exhaustion applies to most patent rights; and national exhaustion applies with respect to patent-protected goods whose price is fixed by the state in Switzerland (e.g., most pharmaceuticals) or in the country in which they are placed on the market.

Article 5 of the CartA regulates binding and non-binding agreements and concerted practices that have the effect of restricting competition in Switzerland. Such agreements are prohibited if they (1) eliminate competition or (2) significantly restrict competition on a market without being justified on grounds of economic efficiency:

i Elimination of competition

According to Article 5(4) of the CartA, agreements regarding fixed or minimum prices[12] and the allocation of territories to the extent that sales by other distributors into these territories are not permitted (in particular forbidding passive sales to distributors or final customers in a given territory) are presumed to eliminate effective competition. Passive sales include sales made over the internet, except in cases where efforts have been made to specifically target customers in a particular territory (in which case these would be deemed active sales).[13]

ii Significant restriction of competition

The significance of the competition restraint is assumed for hardcore agreements, because of their nature, without the need to examine quantitative effects, such as market share. Pursuant to the Vertical Agreements Guidelines (and the related Explanatory Note),[14] the following shall in particular be considered as hardcore restrictions: (1) restrictions on the buyer freely setting its prices; (2) territory and customer restrictions (except in cases explicitly allowed under the Vertical Agreements Guidelines); (3) restrictions on sales to the final customer in a selective distribution system; (4) restrictions on cross-sales among members of the same selective distribution system; and (5) restrictions preventing suppliers from selling components or spare parts to customers other than the distributors designated

11 Although not binding or directly applicable under Swiss law, Commission Regulation (EU) No. 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements may be consulted by Swiss authorities and it would be advisable to take it into account when drafting agreements that may have an impact in Switzerland.

12 If an agreement provides price recommendations (which are, in principle, allowed under Swiss competition law) and if, in practice, it is shown that the recommendations are followed or enforced by the licensor, then this behaviour would fall within the scope of the price-fixing hardcore restriction.

13 See Paragraph 3 of the Vertical Agreements Guidelines.

14 The Vertical Agreements Guidelines and the Explanatory Note are available (in French, German and Italian) on the Comco's website (see footnote 3).

in the agreement.[15] In the context of internet sales, the following can, depending on the circumstances, be considered as hardcore restrictions on prices or territories: (1) direct or indirect influence of the supplier on the prices of resellers (e.g., through threats, warnings or delays in delivery); and (2) agreements providing that:

a resellers shall prevent Swiss customers from accessing their website;

b resellers redirect customers automatically to the website of the supplier or a different reseller in Switzerland; or

c online transactions from other territories are prevented as soon as the credit card allows the identification of an address outside of the allocated territory.[16]

For other restrictions, vertical agreements are assumed not to have a significant effect on the market if none of the parties thereto has a market share of over 15 per cent.

The Explanatory Note provides useful guidance in the context of online sales.[17] Interestingly – in particular, in the luxury sector – the Comco took the view that qualitative criteria imposed on resellers for the sale of products on the internet are permitted in order to ensure that the distributors' online activities are consistent with the supplier's distribution model. A supplier can, for example, impose on distributors, as a condition to integrate its distribution system, the sale of its products in a bricks-and-mortar store. The Explanatory Note further specifies that, in the context of a luxury selective distribution system, the prohibition imposed on the online resellers to sell products through a third-party internet platform does not amount to a restriction on customers. In addition to providing some specific guidance, the Explanatory Note sets forth the general principle that the significance of bans and restrictions on internet sales as well as their justification based on economic efficiencies are subject to a case-by-case assessment.

The restriction of parallel imports (as a hardcore vertical restriction) was the topic of the landmark *Gaba/Gebro* case decided by the Federal Supreme Court (FSC) regarding the manufacturing and distribution of Elmex products.[18] The facts underlying this case are the following: a Swiss licensor, Gaba, granted a licence to an Austrian company, Gebro, to manufacture and distribute Elmex products exclusively for and within Austria. Gebro was contractually prevented from exporting these products, directly or indirectly, to any other country.

In light of the effects doctrine set forth in Article 2(2) of the CartA, the FSC considered the CartA applicable to all situations, provided that they may have effects in Switzerland. It is neither necessary nor permissible to examine the significance of the effects. This means that agreements or unilateral behaviour of market-dominant companies, even outside Switzerland, can be covered by the CartA, regardless of how plausible any effects in Switzerland are.

Further, the FSC decided that agreements pursuant to Article 5(3) and (4) of the CartA – including, in particular, those that allocate markets geographically – have, in principle, by virtue of their object, the effect of significantly restricting competition according to Article 5(1) of the CartA. They therefore constitute unlawful restrictive agreements if they cannot be justified on grounds of economic efficiency. There is no need for an actual impact on competition; a potential impairment is already sufficient, it being specified that

15 See Paragraphs 12 and 13 of the Vertical Agreements Guidelines.
16 See Paragraphs 18 to 20 of the Explanatory Note.
17 See Paragraphs 18 to 25 of the Explanatory Note.
18 FSC, 2C_180/2014 dated 28 June 2016.

'bagatelle' cases are exempted. However, the FSC does not provide further explanations as to the applicable threshold. In particular, since the FSC is content with potential adverse effects on competition, it is unclear to what extent quantitative criteria can be taken into account at all.

The FSC also confirmed in this case that agreements pursuant to Article 5(3) and (4) of the CartA can be sanctioned regardless of whether the statutory presumption of the elimination of effective competition has been rebutted. If an infringement has been established, the FSC assumes as a rule an objective breach of the duty of care and, therefore, fault. In the case at hand, the FSC confirmed the fines of 4.8 million Swiss francs and 10,000 Swiss francs that the Comco imposed on Gaba and Gebro, respectively.

Another recent decision related to parallel imports was rendered by the Federal Administrative Tribunal (FAT) in a case involving Nikon.[19] Similar to the *Gaba/Gebro* case, the *Nikon* case demonstrates the broad territorial reach of the CartA, which was applied in this case to various international distribution agreements (including one for the United States) because they contained provisions capable of affecting parallel imports in Switzerland. Materially, the FAT considered, in particular, that two contractual provisions had the effect of preventing passive sales and, therefore, were unlawful: (1) sales were allowed only in the United States or in the EEA (in agreements with US and EU retailers respectively); and (2) the exclusive purchasing from a Nikon company imposed on Swiss Nikon retailers. The FAT did not recognise Nikon's argument (i.e., that Nikon benefited from patent rights in Switzerland) and imposed a fine of approximately 12 million Swiss francs.

With respect to non-compete provisions, there are no specific rules set out for licence agreements. The Vertical Agreements Guidelines, however, provide some guidance:[20] non-compete provisions are generally acceptable, provided that they are limited to a maximum of five years or one year after the end of the relevant agreement.[21] Moreover, restrictions on the use or disclosure of know-how can be imposed for an unlimited period (after the end of the agreement), provided that the know-how is not in the public domain.[22]

Among other provisions that may be problematic under Swiss law (identified as such mainly by legal scholars), the following are worthy of mention: (1) restrictions preventing a licensee from exploiting its own technologies or from undertaking research and development; (2) grant-back (by way of an exclusive licence or assignment to the licensor) of improvements made by the licensee; (3) no challenge against the licensed intellectual property; and (4) payment of royalties after expiry of the licensed intellectual property right (provided that royalties may still be justified with respect to know-how).

Article 7(1) of the CartA provides that dominant undertakings behave unlawfully if, by abusing their position in the market, they hinder other undertakings from starting or continuing to compete, or disadvantage trading partners. Article 7(2) of the CartA goes on

19 See FAT, B-581/2012 dated 16 September 2016.

20 Note that the Vertical Agreements Guidelines do apply to agreements that include provisions related to intellectual property rights only to the extent that such agreements: (1) are directly related to the use, sale or resale of goods or services; and (2) do not have as their main object the assignment or grant of the right to use intellectual property rights (Article 8(4) of the Vertical Agreements Guidelines). They would thus typically apply to distribution and franchise agreements, as well as to certain licence agreements, but not, for example, to research and development agreements. For those agreements outside the scope of the Vertical Agreements Guidelines, the general provisions of the CartA apply.

21 Article 12(2)(f) and (g) of the Vertical Agreements Guidelines.

22 Article 12(2)(g) in fine of the Vertical Agreements Guidelines.

to list certain practices that are deemed unlawful, in particular: (1) any refusal to deal; (2) any discrimination between trading partners in relation to prices or other conditions of trade; and (3) any imposition of unfair prices or other unfair conditions of trade.

In the *Swisscom* case,[23] the Comco found that Swisscom and its subsidiaries benefited from a dominant position in the market of live broadcasting (using pay TV) of Swiss football championship matches, the Swiss hockey championship and some foreign football championships. This dominant position resulted from the fact that Cinetrade (a subsidiary of Swisscom) enjoyed long-term exclusive rights for sports broadcasting in Switzerland. The abuse was found because Swisscom: (1) refused to offer some of its competitors the right to broadcast these sports live on their platforms; and (2) granted certain other competitors the right to broadcast a limited number of sporting events and these competitors had to offer the broadcast within a bundled offer. The Comco found that this behaviour procured for Swisscom a competitive advantage over its competitors. This decision is the subject of an appeal before the FAT.

With respect to broadcasting rights, the Comco published an advice related to 'right-of-first-negotiation' and 'matching-offer-right' provisions.[24] Within an exclusive broadcasting agreement, a sports association had granted a broadcaster a right of first negotiation (at the end of the term of the agreement). Failing an agreement between the parties at the end of the right-of-first-negotiation period, the broadcaster had a matching-offer right, whereby it could match any offer that was made by a third party to the sports organisation and, therefore, extend the benefit of the exclusivity of the broadcasting rights. The Comco advised that such provisions shall be considered unlawful if they cannot be justified on grounds of economic efficiency.

In the aforementioned *Swisscom* case, the Comco held that Swisscom and its affiliates had adopted the three above-mentioned practices either by refusing to grant the relevant broadcasting rights to some competitors or by imposing unfair terms on some competitors (i.e., the offer of the broadcasts was bundled with another offer).

In another case, the Comco imposed a fine of 7 million Swiss francs on SIX Multipay AG for an abuse of dominant position characterised by SIX's refusal to provide competitors with interface information related to a new functionality (dynamic currency conversion) for credit card terminals, which allows customers to choose the currency they wish to pay in when at the terminal.[25] The information was necessary for competitors to ensure the interoperability of their credit card terminals. Interestingly, SIX argued that Article 21(2) of the CopA does not oblige the copyright owner to provide interface information to competitors. The Comco considered that, by virtue of Article 3(2) of the CartA, intellectual property rights (such as copyrights) shall be taken into account in the assessment under the CartA, but that intellectual property rights do not override the CartA and in the case at hand the dominant position of SIX substantiated the obligation to provide interface information.[26]

With respect to the imposition of excessively high prices (e.g., milestone or royalty payments under a licence agreement) by a dominant undertaking, the Federal Price Supervisory Body has the authority to order a price reduction pursuant to Articles 4 and 10

23 DPC/RPW 2016/4, 920 ff.

24 DPC/RPW 2016/2, 378 ff.

25 DPC/RPW 2011/1, 96 ff.

26 See DPC/RPW 2011/1, 96 ff, p. 115.

of the Federal Price Supervision Act (FPSA). Before taking any decision, the Federal Price Supervisory Body shall first try to reach an amicable solution with the concerned undertaking (Article 9 of the FPSA).

Finally, patent pools have not been the subject of any decisions in Switzerland so far. However, antitrust concerns (price-fixing in particular) may arise in this context; for example, where the patents in the pool consist in substitute technologies.

IV STANDARD-ESSENTIAL PATENTS

No consideration has been given under Swiss competition law (whether in statutes, case law or guidelines) to standard-essential patents.

Nonetheless, the PatA sets forth restrictions on the rights of a patent owner that may apply to standard-essential patents, in particular Article 36 of the PatA (dependent inventions), and Articles 40 ff of the PatA (licensing in the public interest).

Article 36 of the PatA provides that if a patented invention cannot be used without infringing a prior patent, the owner of the newer patent has the right to a non-exclusive licence to the extent required to use the new patented invention, provided that the invention is considered an important technical advance of considerable economic significance in relation to the invention that is the subject matter of the prior patent. The Bern Commercial Court has ruled that an important technical advance occurs; for example, when the new invention leads to a simplification of processes or increases their speed.[27] The Court held that applying the CartA (the owner of the previous patent allegedly had a dominant position on the market) would, in principle, lead to the same result as under Article 36 of the PatA (i.e., the grant of a licence to the owner of the new patent) in cases where it would be justified under Article 36 of the PatA. In this case, it judged that the requirements of Article 36 of the PatA were not met.

Article 40 of the PatA provides that where public interest so dictates, the person to whom the owner of the patent has, without sufficient reason, refused to grant the licence requested, may apply to the court for the grant of a licence to use the invention. It is generally recognised by legal scholars that a public interest exists when the relevant patent is a technical standard (or used therein). Although not specified in Article 40 of the PatA, such a licence would be non-exclusive. Article 40a to 40d of the PatA further provide for compulsory licences in specific cases and under specific conditions: in the field of semiconductor technology (40a), for research tools (40b), for diagnostic tools (40c), and for the export of pharmaceutical products (40d).

The scope and term of the licences that would be granted pursuant to the above-mentioned provisions are limited to the purpose for which they have been granted and may only be transferred with the business that uses the licence (i.e., typically in the context of an asset deal).

27 Bern Commercial Court, HG 03 9024 (BE), published in sic, 2006, p. 348.

V INTELLECTUAL PROPERTY AND MERGERS

i Transfer of IP rights constituting a merger

There are no specific provisions or guidelines under Swiss law with respect to the transfer of intellectual property rights in the context of merger control. The transfer of intellectual property rights may, however, be deemed a concentration under Article 4(3) of the CartA where the intellectual property rights constitute part of a business whose control is acquired by an independent undertaking.[28] The means of acquiring control may involve, in particular, the acquisition of ownership rights or rights to use all or parts of the assets of an undertaking (Article 1(a) of the Federal Ordinance on the Control of Concentrations of Undertakings).

In practice, intellectual property rights are often part of a merger, share deal or asset deal.[29]

The sole transfer of intellectual property rights might also be construed as a concentration of undertakings within the meaning of Article 4(3) of the CartA. The Comco has already ruled that the mere transfer of immaterial assets (i.e., trademarks, know-how, clientele and goodwill in the case at hand) amounted to a concentration of undertakings.[30]

ii Remedies involving divestitures of intellectual property

The Comco may authorise a concentration of undertakings subject to conditions and obligations if it considers that the concentration (1) creates or strengthens a dominant position liable to eliminate effective competition; and (2) does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed (Article 10(2) of the CartA). The CartA does not specify the types of obligations or conditions that can be imposed. In practice, the concerned undertakings will generally discuss the same with the Comco. The remedies usually involve divestments or behavioural undertakings.

In the *Glaxo Wellcome/SmithKline Beecham* case, the merger was authorised by the Comco subject to the out-licensing by the parties of either Vectavir or Zovirax for use in the topical treatment of the herpes simplex virus in the market of topical anti-virals (D6D) in Switzerland.[31] This remedy was inspired by the solution that was reached in the context of the same merger by the European Commission.[32] As the European Commission explains in its decision: '[t]he market test has confirmed that a divestment [by way of out-licensing] of either of the products would remove the overlap between the parties' activities and would, therefore, remove the serious doubts on this market.'[33]

28 Article 4(3) of the CartA defines a 'concentration of undertakings' as (1) the merger of two or more previously independent undertakings; or (2) any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement by which one or more undertakings acquire direct or indirect control of one or more previously independent undertakings or parts thereof.

29 See, e.g., *Emmi/Swiss Dairy Food*, DPC/RPW 2003/4, p. 786, where the Comco held that the transfer of an operating site and related trademarks constituted part of a business that had been acquired.

30 See DPC/RPW 2011/3, p. 413.

31 *Glaxo Wellcome/SmithKline Beecham*, DPC/RPW 2001/2, p. 338.

32 EC, Case COMP/M.1846.

33 EC, Case COMP/M.1846, Paragraph 219.

VI OTHER ABUSES

i Sham or vexatious IP litigation

The concept of abuse under Article 7 of the CartA (unlawful practices by dominant undertakings) covers both exploitative and exclusionary practices. Sham or vexatious litigation is not included in the example list of practices considered unlawful under Article 7 of the CartA. Consequently, the general rules on the abuse of dominant position would apply to such practices, which may be considered as exclusionary practices.

ii Misuse of the patent process

There are no specific rules in Swiss competition law regarding the misuse or manipulation of the patent process (e.g., for the purpose of artificially extending the term or geographical scope of patent protection, or enforcing patents obtained through fraud). Such practices would, therefore, be assessed under Article 7(1) of the CartA.

iii Anticompetitive settlements of IP disputes

There is no relevant case law on this topic in Switzerland. To the extent that a settlement agreement does not amount to a market-sharing or market-foreclosure agreement, the settlement should, in principle, comply with Swiss competition law. Exclusion payments made by a pharmaceutical or biotech company to potential generic or biosimilar entrants on the relevant market may be construed as a market-foreclosure agreement and thus unlawful.

VII OUTLOOK AND CONCLUSIONS

As for past years, the Swiss competition authorities have been active in the past year in all areas of competition law and it can be expected that this will continue in the coming years.

In previous editions, we have mentioned a popular initiative (i.e., the initiative against the 'Swiss island of high prices') that was launched on 20 September 2016 and aimed at combating the practice of setting higher prices in Switzerland as compared with prices in neighbouring countries.[34] Practically, this could lead to the introduction of the relative market power concept into the CartA. The scope of Article 7 of the CartA (unlawful practices of dominant undertakings) would thus be extended because of this new concept, whereby an undertaking would be deemed to have a relative dominant position on the market (e.g., if companies depend on it for the supply of goods or services necessary for their activities and where no reasonable and sufficient alternatives are available). In January 2018, this popular initiative obtained the public support required to submit it to a national vote. A counter-proposal has been drafted by the Federal Council and submitted to consultation in the course of the past year. The Federal Council anticipates submitting its finalised counter-proposal, together with its explanatory message, to the Swiss parliament on 11 June 2019.

34 www.prix-equitables.ch/.

Appendix 1

ABOUT THE AUTHORS

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Doctor Sevan Antreasyan advises and represents clients with regard to intellectual property matters, competition law, healthcare and life sciences, and commercial contracts. He is particularly involved in licensing and R&D transactions with a strong focus on the pharmaceutical/biotechnology sector and represents clients in litigation before Swiss courts as well as in administrative matters before governmental authorities.

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Benoît Merkt is also one of the leading Swiss law practitioners in the field of tax-exempt/non-profit organisations. He heads the firm's practice in this field. He has incorporated major foundations and associations of international scope, and regularly advises clients with respect to the structuring and implementation of charitable projects in Switzerland and abroad.

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