Course: S401006. Business Law for Corporate Decision Makers Prof. Marie-Noëlle ZEN-RUFFINEN GSEM – University of Geneva Date: September 23, 2024	Group Members: 1. Rajendra Laxmi Dhamala 2. Sorina-Ioana Matthey-de-l'Endroit 3. Egide Niyonkuru 4. Ilir Selmani 5. Lidan Wei

Group Assignment: Case Study No. 1

I. Assignment Question:

The CEOs of GOX and GEX are wondering whether their companies risk to be fined and what is the likelihood of the risk. You must help them determine whether the restraint(s) of competition brought to your knowledge is (are) unlawful or not.

II. Key Findings of the Analysis:

The Federal Act on Cartels and other Restraints of Competition (hereafter: Cartel Act or CartA) applies to this case study due to the fact that the members of the "Gold & Silver" framework agreement (hereafter: Gold & Silver) have created an anti-competitive market environment because of the advantages they benefit from.

To further clarify, the members of Gold & Silver consist of jewelry companies (i.e., which may also be described as undertakings that are active in commerce) that are geographically located in Switzerland. Their product market is jewelry. They have created an atmosphere whereby only members who are signatories can benefit from the supply of goods, in addition to the fact that a certain price range is strongly recommended/advised to be used/followed in order to ensure an estimated gross margin of the retailers signatories of 25% to 30% be followed in order to make sure that the price will create sufficient profits the members of the Gold & Silver.

We detect both a vertical and two horizontal agreements in this case study, as described:

1. **One Vertical Agreement:** between the suppliers and retailers (detailed explanation in section: impact on competition for each agreement).

2. **Two Horizontal Agreements (i.e., Agreements Between Competitors)**:
    a. An agreement among suppliers, and
    b. An agreement among retailers (detailed qualitative and quantitative analysis for each horizontal agreement in section: impact on competition for each agreement).

III. Analysis:

1. Scope of the LCart

a) **Personal Scope:**
The undertakings involved in this agreement are the following:

- The members of the Association of Jewelry Suppliers in Switzerland (AJS), of which the supplier, **GOX**, is an undertaking member. And,
- the members of the Swiss Association of Undertakings Specialized in Selling Jewelry (AUSJ), of which the retailer, **GEX**, is an undertaking member.

Clarification: The case involves two associations: the Association of Jewelry Suppliers in Switzerland (AJS) and the Swiss Association of Undertakings Specialized in Selling Jewelry (AUSJ). Members of these associations, such as GOX and GEX, are therefore subject to the application of the Swiss Competition Law (LCart) since they are signatories and thus involved in what can potentially be an anti-competitive agreement, **Gold & Silver**.

b) **Material Scope:**

The signatories of the framework agreement Gold & Silver are participating in an unlawful agreement (CartA 5-6), that represents abuses of dominant position (CartA 7) and makes use of Art. 3 (CartA).

c) **Geographical Scope:**

The geographical location of the agreement has been defined as Switzerland. In addition, even if the retailers located in the cantons of Vaud and Fribourg are not signatories to Gold & Silver, the two most important, Krauskopf SA, and Pittet SA, respect the agreement. All the retailers operate and sell their products in Switzerland, thus this case study requires the enforcement of the CartA.

2. Definition of the Relevant Market:

a) The product market for this agreement is the jewelry market in Switzerland.
b) The geographic market is Switzerland.

3. Assessment of the Impact on Competition for Each Agreement, as Follows:

a) Does elimination of effective competition exist?

Elimination of effective competition is possible as a result of this agreement because:

(1) the market share of the supplier signatories is larger than 72% (i.e., 75 % of suppliers and 45 % of retailers signed the agreement),

(2) the agreement leads to the suppliers fixing the recommended indicated prices (in accordance to Art. 5 III). Thus, fixing the recommended indicative prices by the suppliers (Price Recommendation) can be considered as price fixing in this case because:

a) There is pressure and control of the supplies by conducting and respecting the compliance checks,
b) The recommended price is followed by the distributors as well as retailers, and
c) The price is not of public knowledge ("the supplier gives written notice to its retailers, at least once a year, of the jewelry's references contained in the indicative prices' catalog. Changes in this catalog enter into force three months after their communication".)

(3) Agreeing to allocate according to trading partners (Art. 5 III CartA: "hardcore cartel") Agreement, states that retailers undertake to purchase jewelry only from suppliers (official representatives of the brands in Switzerland) who are affiliated with gold & silver, and that suppliers shall only deliver the brands they represent to retailers affiliated with Gold & Silver.

<u>Impact on Competition for Each Agreement:</u>

1. **Vertical agreement: Agreement among Suppliers and Retailers**
   Concerned Parties: (GOX + AJS and its members) and (GEX + AUSJ and its members)

Impact on Competition: As mentioned in the key findings, impact on competition is accomplished through the framework agreement called **Gold & Silver** where suppliers worth 75% of the market share and retailers worth 45% of the market share agreed to comply with the agreement when doing business. Two parties from different levels made an agreement have thus created an atmosphere whereby only members who are signatories can benefit from the supply and a certain price range should be followed to smooth the business of members of the agreement. The majority of the suppliers only supply to the affiliated retailers and out of those retailers 80% comply with the indicative pricing, which results in price uniformity and hinders the free competition based on pricing.

2. **Two Horizontal Agreements (i.e., Agreements Between Competitors)**:
   a. **An agreement among suppliers:** GOX and the members of AJS

Impact on competition: As mentioned in the key findings, an agreement among suppliers was decided to comply with **Gold & Silver** when supplying their products leading to an anticompetitive environment whereby it becomes quite impossible for the remaining 25% of the market share from the suppliers to outcompete members of the **Gold & Silver.** Plus, since the retailers have to purchase only from the affiliated suppliers, it leaves no room for the remaining 25% market share of the suppliers to supply their product to the retailers that are affiliated with the agreement. As a result, this might lead to competition being eliminated.

   b. **An agreement among retailers: GEX and members of AUSJ**

Impact on competition: As per the key findings, an agreement among retailers was decided to comply with **Gold & Silver** which gives them more options from suppliers to receive large supplies, when compared to retailers who are not members of the agreement, leading to an exclusivity of supplies which restricts the competition for the remaining retailers who have 55% of the market share. This has resulted in restricting the competitors' ability to freely set the prices, and as a consequence to this, the two most important retailers, Krauskopf SA, in Fribourg, and Pittet SA, in Lausanne, have to respect the agreement even though they are not signatories.

b) Is there a significant restraint of competition?

Yes, the agreement leads to significant restraint of competition based on the following analysis:

a. Barriers to Market Entry: There is a significant barrier to enter the market as a retailer since new retailers who enter the market will not be able to purchase jewelry with ease from the suppliers. This is because the suppliers (who have 75% of market shares) only deliver to the retailers who have signed the agreement. GOX even agreed that it delivers the brands it represents only to retailers affiliated with Gold & Silver, hence it is difficult for the new potential competitors to penetrate the market.

b. Combined Market Share of the Parties to the Agreement: The market share of the supplier signatories is larger than 72% (i.e., 75 % of suppliers and 45 % of retailers signed the agreement), describing the majority of the suppliers who entered into the agreement, thus leaving behind a small fraction of suppliers who can compete freely.

c. Passive Selling: The Other obligation of the case states that retailers have to purchase only from the suppliers of gold and silver and, suppliers will deliver only to the brands that represent the retailers affiliated with Gold & Silver, making this an example of passive selling from the suppliers end.

d. Price Fixing: Although the aim of the agreement is to fix a fair price, signatory retailers still practice obtaining a gross margin of 30% (although this was a practice which was repealed two years ago under the pressure of the Competition Commission, facts which have been verified by the Executive Committee of the Gold & Silver). This could lead to a potential restriction on fixing prices.

e. Agreement between Undertakings at Different Levels: According CartA Article 5[4] , the agreement imposes unlawful restraint on competition as there is agreement between undertakings at the level of suppliers and retailers and fixing of the prices. Moreover the other suppliers are restricted to supply to the retailers affiliated to Gold & Silver.

The above points might lead to the restriction of free competition in the market, highlighting that the agreement might eliminate competition and it significantly restricts competition.

c) If yes to b, is the significant restraint of competition justified on grounds of economic efficiency?

The agreement states that it aims to offer consumers jewelry at a fair price, optimal quality price ratio but there is a clear scenario of price fixing, passive selling and non-compliance to the competition commision law. The retailers are still maintaining the 30% margin ratio thereby negating the economic efficiency in the retail jewelry market which leaves no justification on the ground of economic efficiency.

d) Results:
The agreement, which has been done on different levels (both vertical and horizontal), appears to be unlawful as it affects competition (Art 5 and Art 7), as described in the above analysis.

Conclusion:
4. Risk of Sanctions:

As demonstrated by the analysis in this document, the Antitrust Cartel Law applies to the two companies, GOX and GEX, because they are members of the "Gold & Silver" framework agreement, which impacts a large market share, and have consequently contributed to the creation of an anti-competitive market environment in Switzerland.

GOX admitted to deliver the goods it provides with a list of recommended prices and to make compliance checks with the price recommendation list and to deliver the brands it represents only to retailers affiliated with Gold & Silver.

GEX admitted to respect the price recommendation list and a gross margin of 30%.

As GOX and GEX admitted to the following:

a. Recommending the price (leading to price fixing)
b. Compliance check of the price: Pressuring to apply the recommended pricing
c. Passive selling (restricting the supply to the members outside of Gold & Silver)
d. Non-compliance of the old article 12 (repealed two years ago under the pressure of the Competition Commission) and maintaining a 30% profit margin.

As a result, there is a high risk of Sanctions against the GOX and GEX and the sanctions will probably be according to Art 49a[46] for participating in the unlawful agreement pursuant to art 5 and art 7. They will most likely be fined up to 10% of the turnover that they achieved in Switzerland in the preceding three financial years.

References:

251 Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (Cartel Act, CartA) (Status as of 1 July 2023).

Slides, documents and case study provided in class and on the following website of the publication platform for federal law:

Fedlex. (1995, October 6). *Federal Act on Cartels and other Restraints of Competition*. SR 251 - Federal Act of 6 October 1995 on Cartel... | Fedlex