



IP and Competition Law Newsletter Switzerland

Federal Administrative Court Takes a Tough Stance against Sealing Off of Swiss Market

Legal framework regulating distribution

The Federal Act on Cartels and other Restraints of Competition ("**CartA**") provides for the presumption that specific kinds of vertical agreements eliminate effective competition and are thus unlawful. This presumption is applied to vertical agreements regarding (i) fixed or minimum prices, and (ii) the allocation of territories provided such allocation amounts to an absolute territorial protection (prohibition of passive sales).

According to the Verticals Notice of 28 June 2010 issued by the Swiss Competition Commission ("**ComCo**"), the presumption of antitrust violation through absolute territorial protections can be rebutted by proving that there is sufficient *intra*brand and/or *inter*brand competition. However, agreements providing for absolute territorial protection (prohibition of passive sales) are also considered to be qualitatively significant restrictions of competition and thus unlawful even if their quantitative effect is only minor.

In applying the above antitrust principles, the Federal Administrative Court has upheld a ruling of ComCo which fined Gaba International CHF 4.8m. Gaba International is the Swiss producer of the toothpaste Elmex, and a company of the Colgate-Palmolive group.

Prohibition of passive sales infringes Swiss antitrust laws

On the basis of a complaint filed by a leading Swiss supermarket chain, the ComCo initiated an investigation into the arrangements between Gaba International and its Austrian licensee which has produced the toothpaste (Elmex) under a license from Gaba International. The Austrian licensee had refused to sell the toothpaste to the Swiss supermarket chain because under the applicable license agreement it

was contractually prohibited from doing so. The license agreement in place since 1982 provided for an absolute territorial protection, i.e. prohibiting both active and passive sales outside the territory of Austria. Later, after Gaba International became aware of ComCo's investigation into its distribution practices, the license agreement with the Austrian company was amended, from then on allowing passive sales and only prohibiting "*active endeavours to solicit orders for the products outside the territory [Austria]*".

This conclusion came too late and Gaba International was fined CHF 4.8m for significant market restriction. At least the amended agreement which only prohibits 'active sales' outside the territory was considered by ComCo as being in compliance with Swiss antitrust laws.

Swiss antitrust laws apply to vertical restraints whose effects are felt in Switzerland

The Federal Administrative Court upheld ComCo's ruling on appeal. It confirmed that the old version of the license agreement which prohibited any sales outside the territory (Austria) constituted an unlawful vertical restraint aiming at sealing off the Swiss market. In particular, the Court denied Gaba International's argument that the license agreement merely regulated the Austrian market and Swiss antitrust laws should therefore not be applied. In the judges' view, Swiss antitrust laws apply to vertical restraints whose effects are felt in Switzerland, even if such restraints originate in another country. As could be seen in the present case, the parties' arrangement indeed had an effect on the Swiss market as it prevented parallel imports of the Elmex toothpaste from Austria into Switzerland.

Notwithstanding that the Court acknowledged that Swiss consumers have a broad choice of various premium toothpastes and, accordingly, there is signif-



ificant *interbrand* competition in the relevant market, the Court qualified the parties' agreement as an arrangement that significantly restricted competition in a market for specific goods. The judges did not resort to an examination of the quantitative effects of the restriction because they considered such arrangements *per se* to be unlawful because of qualitative reasons.

Gaba International also failed in convincing the Court that the agreement with the Austrian licensee was justified on grounds of economic efficiency because the image of a premium product like Elmex requires selective distribution to selected resellers. This attempt of justification was rebuffed by the Court.

Lessons to be learned

If manufacturers are relying on independent distributors to market their products, they should pay attention that the terms and conditions of their distribution agreement comply with the applicable antitrust regulations.

In particular, to remain compliant with Swiss and EU antitrust regulations, the following principles must be adhered to:

No Price Fixing	Distributor must remain free to fix the minimal resale price of a product.
Parallel Trade restrictions	Supplier may only prevent distributor from actively promoting sales into territories reserved exclusively for himself or other distributors, i.e: * Passive sales must remain allowed * Distributor cannot be prevented from selling in territories which have not been granted to others on an exclusive basis * No automatic rerouting of customers to websites of another distributor
Selective Distribution	No limitation of sales among distributors of a selective network
	No combination of selective and exclusive networks
Spare Parts	No restriction in selling spare parts to third parties

Depending on the market share of the parties and other factual circumstances, also other contractual provisions may raise antitrust issues. Such are, for example:

Non-compete obligations of indefinite duration or which exceed five years
Post-term non-compete obligations lasting more than one year and which are not required to protect know-how
Prohibition of selling specific competing brands in a selective distribution system

The above restrictions of antitrust laws can only be escaped by choosing other ways of distributing the products, such as by marketing the products through commercial agents, or by building up a vertically integrated distribution system within a group of affiliated companies.

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THOUVENIN rechtsanwälte is an innovative and partner-centered law firm with more than three decades of experience in business law. Our Distribution, Licensing & Competition team advises on a wide range of contentious and non-contentious issues related to competition, licensing and distribution. We have long-standing specialized experience in this field of commercial law, and we advise our clients on all aspects of national and international distribution, agency, franchising, and licensing in various fields of commerce and industry.

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