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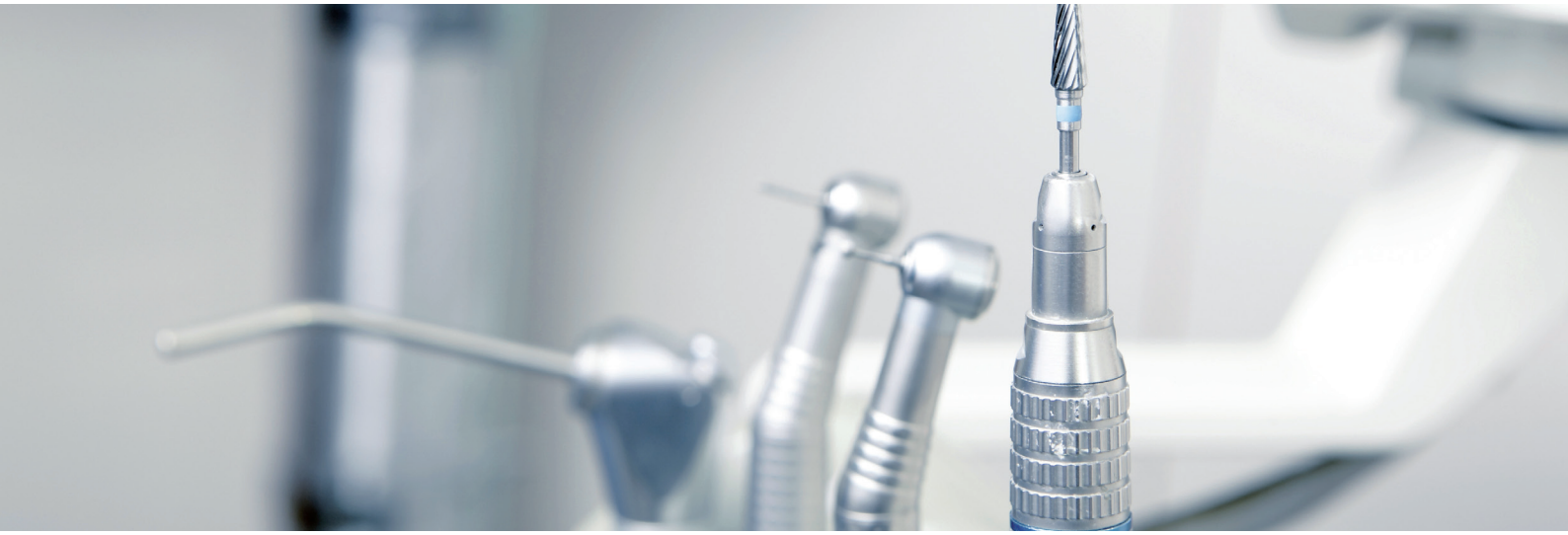

Decision of the Swiss Federal Supreme Court in the Gaba/Gebro case – Tightened standards in Swiss competition law

On 21 April 2017, the Swiss Federal Supreme Court published its decision in the case regarding the manufacturing and distribution of Elmex products (teeth and mouth care products). A public deliberation of the judgement had already taken place on 28 June 2016. The decision addresses fundamental questions of Swiss competition law and has resulted in tightened standards in the application of Swiss competition law both with regard to horizontal and to vertical agreements.

According to the Federal Supreme Court, agreements on price-fixing, quantity limitation and market allocation are especially detrimental to competition due to their subject matter and, in principle, unlawful and subject to sanctions based on their very existence and regardless of their actual effect on competition. These agreements are directly sanctionable except if justifiable on grounds of economic efficiency. The element of significance as in "significant restriction of competition" as provided by the statute has, according to judgement, only the meaning of a de minimis threshold. As to the level of such threshold, and its applicability to agreements considered to be of an especially detrimental nature due to their subject matter, the judgement remains vague. In addition, the Federal Supreme Court states that the mere potential for events which have occurred abroad to have an effect in Switzerland brings them within the territorial scope of application of the Swiss Cartel Act, regardless of the intensity of such effect.

In light of this, in order to avoid the risk of fines by the Swiss Competition Commission ***(ComCo), the decision must be taken into account in the context of contracts dealing with a situation abroad which has the mere potential for having a marginal effect in Switzerland****, such as an export ban on a retailer in a remote foreign country.*

Facts and course of procedure

As per a contract dated 1 February 1982, Swiss-based licensor Gaba International Ltd. (**Gaba**, since 2004 part of the Colgate-Palmolive group) granted Austrian licensee Gebro Pharma LLC (**Gebro**) the right to manufacture and distribute Elmex products (teeth and mouth care products) in Austria. In Switzerland and neighbouring countries except Austria, Gaba was present through its own group companies. The license agreement, which was in force until 1 September 2006, contained a clause obliging Gaba to prevent the export of contract products to Austria, and not to distribute, directly or indirectly, such products within Austria. Gebro, on the other hand, was obliged to manufacture and distribute the products exclusively for, and within Austria, and not to export them, directly or indirectly, to any other country.

On 30 November 2009, the ComCo fined Gaba and Gebro CHF 4.8 million and CHF 10,000 respectively, adjudging the export ban imposed on Gebro as an unlawful absolute prohibition of sales by Gebro to Switzerland (prohibition of passive sales). The fines were confirmed by the Federal Administrative Court in 2013 (first instance of appeal), and now by the Federal Supreme Court.

Main findings, conclusions and open questions

— In accordance with the international standard, Swiss competition law applies to events that have an effect within Switzerland (effects doctrine). According to the judgement of the Federal Supreme Court, the mere potential for international events to have an effect in Switzerland is sufficient to trigger the applicability of the Swiss Cartel Act, regardless of the intensity of such potential effect. As a consequence, general export bans imposed on retailers anywhere in the world, regardless whether export to Switzerland has been explicitly prohibited or whether the ban was in fact implemented, fall within the territorial scope of the Cartel Act.

— In addition, the judgement addresses the long-debated question of the meaning of "*significant restriction*" of competition. According to Article 5(1) Cartel Act, agreements are prohibited if they either eliminate or, without justification, significantly restrict competition in a certain market (Article 5(1) Cartel Act). Since, in most cases, competition will not be completely eliminated and, in cases where competition is only restricted, a justification is often not possible, the element of "*significant restriction*" of competition becomes crucial.

— In line with the wording of the statutory provision, when assessing the lawfulness of an agreement, past decisions considered both the subject matter of the agreement (qualitative criterion) as well as quantitive criteria such as the market shares of the parties involved and the actual impact on competition. The unlawfulness of an agreement required both qualitative and quantitative elements and, in particular, some actual negative effect on competition, even though agreements considered being of an especially detrimental nature due to their subject matter required less on the quantitative side.

— The Federal Supreme Court assessed the elements of significance and restriction of competition separately. According to the court, the **element of significance** has the function of a mere *de minimis* clause. The judgement makes reference to the criterion of appreciability in the EU, but leaves open how much is required on the quantitative side in order for the *de minimis* threshold to be met. However, the Federal Supreme Court concludes that agreements considered to be especially detrimental to competition (Article 5(3) and (4) Cartel Act) meet the necessary threshold of significance in principle or usually already by way of their mere nature. Due to the rather vague wording ("*in principle*", "*usually*"), it remains unclear whether and, if so, under what circumstances, the quantitative element of the *de minimis* clause also applies to such agreements.

— The court identifies as especially detrimental to competition agreements among competitors on price-fixing, quantity limitation and the allocation of markets (geographically or according to trading partners; Article 5(3) Cartel Act) and agreements between companies at different market levels (such as manufacturers and retailers) on minimum or fixed resale prices or absolute territorial protection in distribution agreements (Article 5(4) Cartel Act). Once there is proof for the existence of such an agreement, the law provides for a rebuttable presumption that the agreement eliminates competition and for substantial fines (Article 49a(1) Cartel Act). Following the Gaba/Gebro judgement, such agreements carry the risk of being subjected to fines regardless of the market share of the parties involved or their actual effect on competition on the relevant market. In cases where the presumption can be rebutted, one has the possibility to justify the agreement based on grounds of economic efficiency (see below).

— In regards to the **element of restriction of competition**, the Federal Supreme Court concludes that the mere potential of an agreement to restrict competition is sufficient and, thus, no actual negative impact is required. According to the judgement, the mere existence of a potentially restrictive agreement already amounts to a *"restriction"* within the meaning of Article 5(1) Cartel Act, regardless of whether the agreement has been implemented or not.

— In line with these findings, the Federal Supreme Court concludes that the actual core of the substantive competition law analysis, with regard to agreements, is limited to the question of whether an agreement is justified on grounds of economic efficiency

(Article 5(2) Cartel Act). The possibility to justify an agreement is limited to agreements that do not eliminate, but only significantly restrict competition on a certain market. According to Article 5(2) Cartel Act, agreements are justified if they (i) are necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally, and (ii) do not enable the parties involved to eliminate effective competition. In short: An agreement is justified if it results in greater efficiency than would have been achievable without the agreement, and if there exists no possibility to eliminate competition.

— The manufacturer's (Gaba's) argument that the licence agreement qualified as a technology transfer agreement, to which – by way of analogy to the situation in the EU – another legal regime regarding clauses on territorial protection must be applied, was countered by the Federal Supreme Court, which stated that the EU block exemption on technology transfer agreements does not apply in Switzerland. The fact that this special regime on technology transfer was not taken into account by the court, neither when applying Article 5(4) Cartel Act nor when assessing a possible justification on grounds of economic efficiency (Article 5(2) Cartel Act), is surprising if one considers that the Federal Supreme Court regularly refers to the comparability of the EU and Swiss provisions on anti-competitive agreements in its judgement and, *inter alia*, states that the Swiss regime with regard to agreements on absolute territorial protection is equal to that in the EU. From the general statements in the decision on the parallelism of the Swiss and the EU regimes one could draw the conclusion that the court's reasons for not taking the EU block exemption into account are that EU competition law has been amended since the introduction of Article 5(4) Cartel Act and that agreements such as clauses on absolute territorial protection have a greater impact on smaller countries such as Switzerland.

— In addition, the judgement confirms the position taken by the ComCo in the past that the sanctionability of agreements falling under Article 5(3) or (4) Cartel Act is based on the nature (type) of the agreement rather than the fact that the agreement eliminates competition. As a consequence, the proof of the existence of a horizontal agreement on price-fixing, quantity limitation or market allocation or a vertical agreement on resale prices or absolute territorial protection is liable to a fine, even if the presumption of elimination of competition can be rebutted.

— One can draw the conclusion from the findings of the Federal Supreme Court on the calculation of the fine, that compliance programs may have to be taken into account as a mitigating factor in cases where the anti-competitive behaviour has been committed by employees with a lower level of responsibility.

— The major difference in the scale of the fines imposed on the two parties involved was not seen by the court as a violation of the constitutional right of Gaba to equal treatment.

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