

## Client Alert

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### Leading decision of the Swiss Supreme Court on by-object restrictions under Swiss competition law

*On 28 June 2016, the Swiss Federal Supreme Court (the "**Court**") rendered a leading decision regarding the significance of anti-competitive agreements under Swiss law (decision no 2C\_180/2014). The Court found that horizontal agreements between competitors on prices, quantities and allocation of territories or customers according to art. 5(3) of the Swiss Cartel Act and vertical agreements regarding fixed or minimum prices and restriction of passive sales according to art. 5(4) of the Swiss Cartel Act are by their nature (by object) a significant restriction of competition, regardless of any quantitative elements or negative effects on competition.*

#### The case

The Court dismissed the appeal brought by Colgate-Palmolive (previously Gaba International) against a 4.8 million Swiss francs fine imposed by the Swiss Competition Commission ("**ComCo**") for restricting parallel imports of Elmex toothpaste to the country. The court deemed that a prohibition on parallel imports was a significant restraint on competition regardless of quantitative elements such as market share or price difference. Agreements that significantly restrict competition are unlawful under Swiss law, subject to justification for economic efficiency. In the present case, arguments of economic efficiencies did not prevail. Therefore, the Court found that the restriction of parallel imports is an unlawful vertical restraint that significantly restricts competition and is not justified by economic efficiencies.

This is an important judgment on the admissibility of restrictions on parallel imports and has wider implications for pending judgments, not only regarding vertical restraints but very likely also in horizontal cases.

#### Background

From 1982 to 2006 Gaba International ("**Gaba**") effectively prevented Gebro Pharma GmbH ("**Gebro**"), its Austrian licensee, from exporting Elmex products to other states as well as passive sales of its toothpaste products to Swiss customers. The agreement between Gaba and Gebro specified that toothpaste products were prohibited from being exported outside Austria. Although Switzerland was not specifically mentioned in the agreement, the clause implicitly prevented Gebro from exporting toothpaste from Austria to Switzerland and, therefore, restricted parallel imports into Switzerland. As a

result of this, ComCo fined Gaba 4.8 million Swiss francs for infringing Swiss competition laws. This fine was confirmed on appeal by the Federal Administrative Court in its 2013 decision. The Federal Administrative Court found that the ban on exports and parallel sales to Switzerland constituted a vertical agreement significantly affecting competition on the Swiss market under article 5(4) of the Swiss Cartel Act. While ComCo took into account quantitative elements (such as market shares of the parties) in order to assess the negative effect in the relevant market, the Federal Administrative Court took the view that agreements restricting passive sales are by nature unlawful, unless such agreements can be justified on grounds of economic efficiency.

## Significant restriction of competition

On Tuesday 28 June 2016, the Court rejected the appeal on the grounds that agreements on prices, quantities and territorial restrictions have the qualitative effect of significantly restricting competition even when the presumption of the elimination of effective competition has been rebutted. This is the case regardless of quantitative factors such as the market share of the participants or price difference. Unless these agreements can be justified on the grounds of economic efficiency, these agreements are by nature (by object) unlawful. To draw a parallel under European law, such agreements would be considered to have as their object the restriction of competition.

Consequently, the Court held that ComCo was justified in regarding the restraints on exports and parallel sales imposed on Gebro as an unlawful vertical agreement which significantly restricted competition.

## Sanctions

In addition, the Court also decided on the fundamental question regarding direct sanctions according to art. 49a of the Swiss Cartel Act. According to said article, companies that participate in an unlawful agreement pursuant to art. 5(3) or art. 5(4) of the Swiss Cartel Act are subject to a fine up to 10 per cent of the company's turnover achieved in Switzerland in the preceding three financial years. It was disputed under Swiss law whether a company can only be sanctioned if the legal presumption of eliminating effective competition is applicable or also if the presumption can be rebutted but the agreement still significantly restricts competition.

The Court ruled that, as a matter of legal principle, ComCo has the right to directly sanction companies, not only in cases where unlawful agreements lead to the elimination of effective competition, but also where, as in the present case, the presumption according to art. 5(3) or 5(4) of the Swiss Cartel Act can be rebutted but the agreement still significantly restricts competition and cannot be justified on the grounds of economic efficiency.

## Actions to consider

The written reasons of the Court for the decision are not yet available. Once available it should be read carefully for any potential nuances. However, based on the provided press release of the Court, the following actions should be considered:

- » It is important to check your distribution and licence agreements as clauses restricting exports to countries in the EU or EEA are likely to have an indirect adverse impact on competition in Switzerland regardless of whether or not Switzerland is specifically referred to in the agreement.
- » Do not draft agreements that generally prohibit exports and thereby implicitly also passive sales where such prohibition could affect the Swiss market.

## Conclusion

Agreements which are presumed to lead to the elimination of effective competition (i.e. horizontal agreements on prices, quantities and allocation of territories or customers and vertical agreements on fixed or minimum resale prices or restriction of passive sales) are by their nature (by object) considered to at least significantly restrict competition if the legal presumption can be rebutted. Therefore, such agreements are unlawful unless they can be justified on grounds of economic efficiencies.

The case has confirmed that even if the presumption of the elimination of effective competition has been rebutted, the ComCo still has the right to sanction companies. This would arguably broaden the powers of the ComCo to enforce Swiss competition law.