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## Tightening Antitrust Law

In a recently-published landmark decision in the Gaba/Gebro matter, the Swiss Federal Supreme Court held that, generally, hardcore restrictions of competition (meaning agreements between competitors concerning prices, volumes, territories or business partners or sales agreements concerning absolute protection of territories and resale price maintenance) significantly affect competition. If an undertaking cannot provide evidence of economic efficiency to justify such agreements, massive sanctions may be imposed – regardless of market share, implementation of the agreement or its actual effects.

### Introduction

The purpose of the Cartel Act is to prevent effects of cartels and other restraints of competition that are economically or socially harmful. In practice, it has long been unclear what value the “damaging effects” are to play in the legal assessment of cartels. In Switzerland, this discussion has been about the concept of “significant” restriction of competition. Thus, the vast majority of the legal literature and the Competition Commission (“ComCo”) had the view that an agreement only has a significant negative effect on competition if certain market indicators (such as market shares) suggest that it does.

This approach had the advantage that state intervention that might be damaging to the economy could be avoided based on an examination of the practical effects of an agreement. Especially in agreements within a sales chain (what are known as vertical agreements, such as between manufacturers and distributors), negative effects from an economic point of view are often not obvious. So rather cautious intervention by ComCo would be called for from a policy point of view. Nevertheless, the Federal Supreme Court has done away with the effects approach, specifically in regard to such vertical agreements, which leads to a considerable tightening of antitrust law.

### Underlying facts

Gaba develops and sells Elmex dental care products. Except for Austria, Gaba sells these products in countries bordering Switzerland directly through its subsidiaries. Gaba gave Gebro the right to manufacture and sell Elmex products in Austria (license). The contract in effect from 1982 to 2006 stipulated that Gebro was prohibited to directly or indirectly export to other countries. The average cost price for Elmex red toothpaste was significantly higher in Switzerland than in nearby foreign countries, with Spar though doing parallel imports of Elmex red into Switzerland. ComCo qualified the export ban as absolute territorial restriction in regard to Switzerland and fined Gaba about CHF 4.8 million in 2009. The Federal Administrative Court confirmed this sanction in 2013.

### Decision of the Federal Supreme Court

The Federal Supreme Court also supported the ComCo decision in oral deliberations on June 28, 2016. The written statement of the grounds has been available since April 21, 2017 (2C\_180/2014).

First, the Federal Supreme Court discussed the significance of the effects doctrine in Swiss competition law. Decisive for the application of the Cartel Act is whether a certain behavior may have

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an effect in Switzerland. According to the Federal Supreme Court, it is not necessary that there be an actual effect or a certain intensity of the effect. Instead, it is sufficient that the behavior may potentially have an effect on the Swiss market. This broad interpretation can in practice mean that clauses in contracts between foreign parties which have potential effects on the Swiss market (for example, restrictions to export) are sufficient for a sanction in Switzerland; the actual effects no longer play a role for hardcore cartels.

the future have to provide evidence of reasons for efficiency in each individual case. If such evidence cannot be provided, there is a risk for financial sanctions in the millions. Nor can sanctions be avoided by successfully refuting the legal presumption that hardcore cartels eliminate effective competition.

The Federal Supreme Court still leaves room for further development of the law: It says it understands the rule stated as a de minimis clause. Thus

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The Gaba case was initiated by Denner, a discount retailer: Denner was interested in doing parallel imports of Elmex red toothpaste from Austria and made a complaint to ComCo in this regard. The export ban agreed upon between Gaba and Gebro was qualified by ComCo as an absolute territorial protection clause (prohibition of active and passive sales) because imports into Switzerland were restricted by the ban on exporting from the foreign sales territory. Passive sales mean that a seller fulfills unsolicited orders from



customers outside its sales territory. Among the matters at issue before the Federal Supreme Court was whether there was a "significant restriction of competition" under Article 5 (1) Cartel Act. In this regard, the court held that hardcore cartels generally reach the significance threshold to be particularly damaging agreements – regardless of the quantitative effects on the market. That means that the actual implementation of the agreement and the effects on the market or the market shares of the companies involved need not be checked or verified by ComCo. It is also irrelevant how strong the competition from other brands is (inter-brand competition).

the court left the decision as to which competition agreements would be examined up to the judgment of ComCo. However in the process, it is not giving the authority guidelines about what is to be considered a de minimis case.

## Conclusions

The Federal Supreme Court has greatly tightened the Swiss Cartel Act with its decision. If there is a hardcore restriction of competition, ComCo need not show any effect of the agreement on the market. It is up to the companies involved to provide evidence of sufficient grounds of economic efficiency to avoid sanctions.

For that reason, it is recommended that all contracts with competitors or within a sales chain with resellers be examined from competition law perspectives, particularly for hardcore restrictions of competition, to ensure that there is no violation of cartel law.

That applies even to contracts that do not have anything to do with Switzerland directly, but that because of generally-phrased export ban clauses could affect the Swiss market.

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