

Briefing April 2017

Prohibitions of Parallel Imports into Switzerland Generally Unlawful – No Need to Show Actual Effects

The Swiss Federal Supreme Court (**FSC**) has upheld a fine of CHF 4.8 million against Colgate-Palmolive Europe Sàrl (**Colgate-Palmolive**) for barring its licensee Gebro Pharma GmbH (**Gebro**) from making parallel exports out of Austria. A 3-2 majority of the FSC ruled that this export ban would infringe the Swiss Act on Cartels (**CA**) regardless of whether there would have been actual appreciable effects in Switzerland and regardless of quantitative aspects such as the degree of interbrand-competition.

Facts

Colgate-Palmolive had obliged its Austrian licensee Gebro not to export Elmex toothpaste products out of Austria into any other country.

The Swiss Competition Commission (**ComCo**) held that this export ban would be unlawful under Swiss competition law and imposed a fine of CHF 4.8 million on Colgate-Palmolive. ComCo held that the export ban did significantly restrict competition in Switzerland and that it could not be justified on grounds of economic efficiency.

Comco's decision was upheld by the Federal Administrative Court (**FAC**). The parties appealed the FAC-judgment. The FSC, however, rejected the appeal (see reasoned judgment of 28 June 2016, 2C_180/2016, published 21 April 2017 on <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000neu.htm>).

Appreciable effects not necessary for jurisdiction of ComCo

The parties first argued that ComCo had not established that the export ban had had appreciable effects in Switzerland; as a result, ComCo would not have jurisdiction.

The FSC rejected this argument. The FSC held that potential effects in Switzerland would be sufficient for ComCo to have jurisdiction. The FSC stated that the export ban would prohibit exports of Gebro out of Austria; this would restrict potential competition in Switzerland and, for this reason, there would be potential effects in Switzerland.

No implementation of agreement necessary

The parties further argued that the export ban had not restricted competition at all because the parties had not implemented the export ban.

The FSC rejected this argument too. The FSC held that there would be no need to establish that an alleged restriction had actually occurred. The FSC held that a potential restriction of competition would be sufficient.

Quantitative criteria irrelevant for significance of restriction

Moreover, the parties argued that the FAC should have considered quantitative factors such as the interbrand-competition with other toothpaste brands and the fact that the export ban was not implemented when assessing whether the export ban would constitute a **significant** restriction of competition.

The FSC also rejected this argument. Among other things, the FSC held that the criterion of “significance of restriction of competition” would serve as a de-minimis threshold with the purpose of facilitating the application of the law. This purpose would be defeated if the competition authorities would have to undertake a sophisticated assessment of each agreement.

The FSC then went on to argue that the CA would presume that the restriction of passive sales would presumptively eliminate effective competition. Even if this presumption could be rebutted (as in the case at hand), the restriction of passive sales would still be particularly harmful to competition.

Based on these considerations, the FSC concluded that a restriction of passive sales (such as the one at hand) would “**generally**” **restrict competition significantly** without ComCo having to establish a quantitatively significant restriction of competition (for example based on high market shares of the parties,

or based on a high adherence rate etc.). The FSC did not elaborate under which conditions a restriction of passive sales would not restrict competition significantly.

The FSC further held *obiter* that the same approach would apply to resale price maintenance (i.e. when a supplier would oblige a dealer to sell at a certain minimum price) as well as to agreements among competitors to fix prices, to restrict production-, purchasing- or supply-quantities or to allocate territories or customers. In other words, all these agreements would in general be unlawful unless they could be justified on grounds of economic efficiency.

Outlook

The Colgate-Palmolive-judgment may have far reaching consequences for the application of Swiss competition law. The judgment may mark the departure from an effects-based approach to a form-based approach with little or no regard to the actual effects of a conduct.

Impact on EEA distribution agreements

A consequence of the Colgate-Palmolive-judgment is that restrictions of parallel exports out of any EEA country are likely to be considered to be generally unlawful under Swiss competition law.

For example, a mere contractual ban to export goods out of Denmark is likely to be generally unlawful under Swiss competition law. The same applies to agreements prohibiting exports out of the EEA (because Switzerland is not a member state of the EEA).

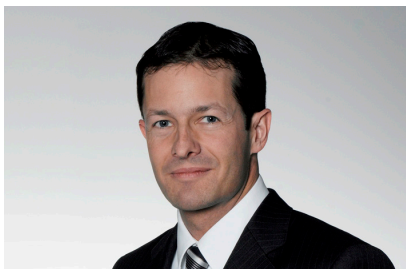
Therefore, when drafting EEA distribution agreements, it is of paramount importance to treat the territory of Switzerland as if Switzerland were an EEA member state.

Impact on horizontal cooperation agreements

If applied mechanically, the Colgate-Palmolive-judgment may have far reaching consequences for other innocuous forms of cooperation such as joint purchasing, production joint ventures, insurance pools etc. too.

In the past, ComCo has regularly held that such cooperations constitute agreements among competitors to fix prices respectively to restrict production-quantities (which presumptively eliminate effective competition). Under the new Colgate-Palmolive-doctrine, such cooperations would only be lawful if ComCo would accept that they could be justified on grounds of economic efficiency. Factors such as whether the agreement would promote competition, whether the market shares of the parties would be small, whether there would be strong competition from other market players etc., would be irrelevant in assessing whether the cooperation would restrict competition significantly. Such factors may only come into play (if at all) when assessing the justification on grounds of economic efficiency.

Your Key Contact



Dr. Mani Reinert

Partner

T: +41 58 261 52 88

mani.reinert@baerkarrer.ch

Bär & Karrer Ltd.

Brandschenkestrasse 90

CH-8027 Zurich

Telephone: +41 58 261 50 00

Fax: +41 58 261 50 01

zurich@baerkarrer.ch

baerkarrer.ch

Zurich, Geneva, Lugano, Zug

