

## Is your distribution agreement compliant with Swiss competition law?

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In a recent decision, the Swiss Federal Administrative Court fined a Swiss company with CHF 4.8m because its agreement with an Austrian licensee prohibited the licensee to conduct sales outside Austria. Time to recap the dos and don'ts in vertical agreements.

### 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 intrabrand and/or interbrand 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 anti-trust laws

Subject of the case were 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 thus provided for an absolute territorial protection,

i.e. prohibiting both active and passive sales outside the territory of Austria. ComCo qualified such agreement as a violation of 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 license agreement which prohibited any sales outside the territory (Austria) constituted an unlawful vertical restraint aiming at sealing off the Swiss market. 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.

Notwithstanding that the Court acknowledged that there was a significant 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.

### Lessons to be learned

If manufacturers are relying on independent distributors to market their products, they should examine their agreements to make sure that the terms and conditions 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.: <ul style="list-style-type: none"> <li>• Passive sales must remain allowed</li> <li>• Distributor cannot be prevented from selling in territories which have not been granted to others on an exclusive basis</li> <li>• No automatic rerouting of customers to websites of another distributor</li> </ul> |
| Selective Distribution      | No limitation of sales among distributors of a selective network  |
| No combination              | 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

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An examination of your distribution or license agreements will be customized to your particular needs and can be provided on a fixed price basis. We calculate with an average hourly rate of CHF 400.00.

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