Kluwer Competition Law Blog

# Major re-interpretation of Swiss competition law: price-fixing, quantity-limiting and market-allocating agreements are per se il-legal regardless of effect and may lead to direct sanctions

Nicolas Birkhäuser, Alessandro Stanchieri (Niederer Kraft & Frey) · Thursday, May 4th, 2017

On 21 April 2017, after almost 10 months, the Swiss Federal Supreme Court published reasons for its judgment of 28 June 2016 in the matter of Colgate-Palmolive Europa Sàrl (former Gaba International AG). With a majority of 3 to 2, the Federal Supreme Court rejected an appeal made against the judgment of the Swiss Federal Administrative Court (FAC) and confirmed the Swiss Competition Commission's (COMCO) 4.8 million Swiss Franc sanction against Gaba. COMCO imposed the sanction in November 2009 because Gaba had contractually obliged its Austrian licensee (Gebro) not to export certain products out of Austria. According to COMCO, the agreement significantly restricts competition in Switzerland. The Federal Supreme Court held that price-fixing, quantity-limiting and market-allocating agreements in the sense of art. 5 para. 3 and 4 of the Federal Act on Cartels and other Restraints of Competition (Cartel Act, CartA) are generally significant restrictions of competition («*erhebliche Beeinträchtigungen des Wettbewerbs*») within the meaning of art. 5 para. 1 CartA, regardless of their effect.

This post outlines the key points of the Federal Supreme Court's judgment and its possible consequences.

## 1. Introduction

There has long been uncertainty as to how the significance («*Erheblichkeit*») of restrictions of competition within the meaning of art. 5 para. 1 CartA is to be determined. Part of the doctrine and case law holds that agreements within the meaning of art. 5 para. 3 and 4 CartA must be deemed to significantly restrict competition, regardless of their effect (significance by object). Another part of the doctrine and case law holds that agreements can only be held to significantly restrict competition if they actually have an appreciable effect on competition in Switzerland (significance by effect). COMCO, as well as the FAC, has changed its view on this topic over the last years. The Federal Supreme Court has also had a different practice, which it did not, however, debate in the judgment. With its new ruling, the Federal

Supreme Court (so it seems) puts an end to the debate. If applied in future practice, the judgment will have far-reaching impacts for businesses worldwide.

## 2. Key Points

- **Per se prohibition of price-fixing, quantity-limiting and market-allocating agreements**

The Federal Supreme Court held that price-fixing, market-allocating and quantity-limiting agreements according to art. 5 para. 3 and 4 CartA generally qualify as a significant restriction of competition within the meaning of art. 5 para. 1 CartA because of their nature (object): It is not necessary that these agreements are implemented or have an effect on competition. Such agreements are prohibited and can be sanctioned without any further requirements, unless they are justified on grounds of economic efficiency (the judgment is not specific on whether the limited exceptions listed in art. 5 para. 2 lit. a CartA are the only possible justifications). Since the justification on grounds of economic efficiency is rarely applicable to these types of agreements, the ruling *de facto* leads to a *per se* prohibition. According to the Federal Supreme Court, the significance test (which is explicitly stated in the CartA) is only a *de minimis* clause; it does not state whether there is a materiality threshold, below which art. 5 CartA is not applicable.

- **Potential effects in Switzerland suffice**

According to the Federal Supreme Court, price-fixing, quantity-limiting and market-allocating agreements according to art. 5 para. 3 and 4 CartA are prohibited irrespective of whether they have any effect in Switzerland: It is sufficient that the agreements have the *potential* to affect competition. As a consequence, numerous agreements that have no negative effects on competition whatsoever may, in the future, be prohibited and lead to sanctions, even if they originate outside of Switzerland. The Federal Supreme Court explicitly states that it is irrelevant if an agreement was never implemented. The mere fact that an agreement according to art. 5 para. 3 and 4 CartA was entered into is sufficient for a sanction to be imposed.

- **Far reaching impact on various types of agreements**

If the Federal Supreme Court's ruling is applied, it may have far reaching consequences for various types of agreements (besides distribution agreements that were the object of this judgment) such as, exclusive purchasing agreements, technology transfer/license agreements in the sense of the EU TTBER, joint purchasing agreements, manufacturing cooperation agreements and other types of cooperation agreements which may be held to qualify as price-fixing, quantity-limiting and/or market-allocating agreements according to art. 5 para. 3 and 4 CartA, respectively. Problems might further particularly arise with regard to information exchange between competitors and price recommendations from suppliers to retailers. Based on COMCO's current practice, such agreements and practices may potentially fall within the scope of art. 5 para. 3 or 4 CartA and be *per se* prohibited based on the Federal Supreme Court's ruling.

- **Inconsistent parallelism between Swiss and EU competition law**

The Federal Supreme Court argues that the legislator wanted to establish parallelism between Swiss and EU law. However, the Federal Supreme Court argues in the same judgment that the legislator did not want parallelism in certain areas, such as technology transfer/license agreements. For instance, the Federal Supreme Court generally refuses the application of the EU TTBER, which means that an agreement that would qualify as compliant with EU competition law, e.g. because it falls under an exemption of the EU TTBER, may be held to be unlawful under Swiss competition law.

## 3. Conclusion

The ruling of the Federal Supreme Court has a significant impact on Swiss competition law and on its extraterritorial application. According to the Federal Supreme Court, agreements that have no effect whatsoever (e.g. because the parties do not comply with them) and only potentially affect competition are unlawful and can lead to direct sanctions if they fall within the scope of art. 5 para. 3 or 4 CartA. As no effect on the Swiss market is required, this approach could be used to challenge and prohibit agreements with hardly any link to Switzerland. It remains to be seen what exactly the impact of this judgment on COMCO's practice (and on Swiss competition law in general) will be. In any event, companies must take the possible consequences of the judgment into account not only when doing business in Switzerland, but also in respect of their EEA agreements and even worldwide (keeping in mind that Switzerland is not a member state of the EEA and that, therefore, e.g., export bans out of the EEA would qualify as export bans into Switzerland).

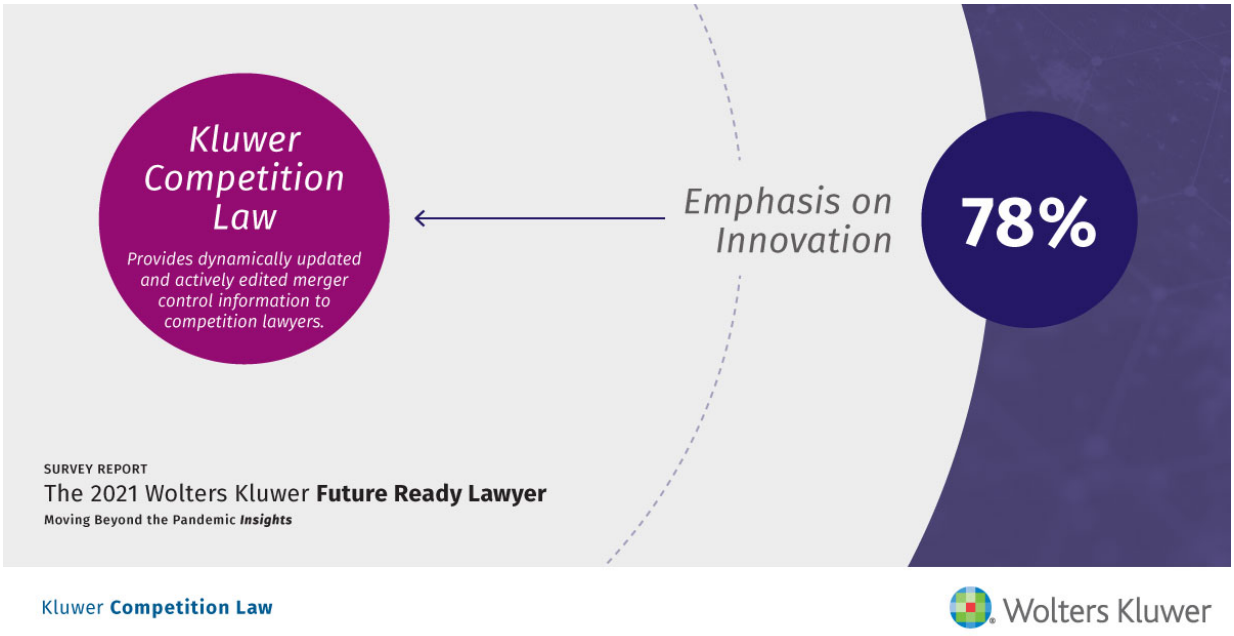
---

*To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.*

## Kluwer Competition Law

The **2021 Future Ready Lawyer survey** showed that 78% of the law firms realise the impact of transformational technologies. Kluwer Competition Law is a superior functionality with a wealth of exclusive content. The tool enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.




This entry was posted on Thursday, May 4th, 2017 at 2:00 pm and is filed under Source: OECD“>Cartels, Switzerland
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.