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Latest Developments on Vertical Agreements in Swiss Competition Law

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The Swiss Federal Administrative Court ("FAC") recently passed two new judgments on vertical agreements. In the first judgment, the Court endorsed its previous Gaba case law and confirmed a sanction against BMW AG ("BMW") amounting to CHF 156 million for restricting direct and parallel imports. In contrast, in the second judgment it annulled a sanction against Altimum SA ("Altimum") for alleged resale price maintenance.

The crucial question in both cases whether hard core restrictions on prices or territories constituted per se illegal restraints of competition subject to fines was decided contradictorily.

Confirmation of the Gaba case law

In May 2012, the Competition Commission ("ComCo") imposed a fine amounting to CHF 156 million on BMW AG for restricting direct and parallel imports into Switzerland. According to the ComCo, BMW's EEA dealer contracts contained export ban clauses which prohibited EEA dealers from selling new BMW and MINI branded vehicles to customers outside the EEA and therefore to Swiss customers. BMW had, according to the ComCo, foreclosed the Swiss market and prevented competitive pressure on end-selling prices of new BMW and MINI vehicles. Therefore, end customers in Switzerland were not able to benefit from the significant exchange rate advantages.

On appeal, in its judgment of 13 November 2015 the FAC fully confirmed the fine imposed on BMW.

Firstly, the FAC stated that pursuant to the effects doctrine restrictions of competition committed outside Switzerland also fall into the geographic scope of the Swiss Federal Act on Cartels ("CartA"). It is sufficient that the restriction of competition may have an effect on the Swiss market. Whether the restriction of competition actually has an effect on the Swiss market is not decisive. In the case at hand, it was sufficient that BMW's EEA dealer contracts could affect the selling of new vehicles into Switzerland.

Secondly, the FAC held that territorial restrictions (in particular absolute territorial restrictions) within the meaning of Article 5 (4) CartA are per se to be qualified as significant restrictions of

competition ("per se restrictions"). If and to which extent such agreements had an actual effect on competition is therefore irrelevant and does not have to be assessed.

Based on this, the FAC concluded that the export bans in BMW's EEA dealer contracts constitute a significant restriction of competition. The FAC confirmed the (theoretical) possibility of a justification based on economic efficiency grounds. However, BMW did not succeed in demonstrating such grounds in the case at hand.

With this judgment, the FAC fully confirmed its Gaba/Gebro case law in which it had for the first time established the concept of per se restrictions in Switzerland.

Vertical Price Fixing: No per se restrictions

In August 2012, the ComCo imposed a fine on Altimum amounting to CHF 470'000 for vertical price fixing. According to the ComCo, the price recommendations of Altimum amounted to resale price maintenance, in particular due to Altimum's pressure on the dealers to follow its price recommendations. In view of the ComCo, the dealers did not have the possibility to set their prices autonomously.

In its judgment of 17 December 2015, the FAC annulled the decision of the ComCo. The Court clarified that price recommendations only constitute a restriction of competition in the sense of resale price maintenance if (i) there is an agreement between the producer and reseller regarding the acceptance of such price recommendations or (ii) if the reseller's freedom to set its own resale prices is restricted (e.g. due to pressure or incentives to follow price recommendations by the manufacturer/main importer) and, cumulatively, the price recommendations are effectively followed to a large extent.

In the case at hand, the FAC found (contrary to the ComCo) that an agreement on minimum resale prices was actually proven only with respect to approximately 12% of the resellers. Regarding the remaining resellers, the Court considered that there was no agreement on resale prices.

Regarding the central question of per se restrictions, the FAC stated in accordance with the previous case law of the Federal Supreme Court and its ruling in a case regarding alleged horizontal price fixing (window fittings case) that not only qualitative but also quantitative effects had to be taken into account. This means that in case of vertical price fixing, the authorities must actually prove either the elimination or the significant restriction of competition on the relevant markets. According to the Court, the authorities have to assess effective anticompetitive effects on the relevant markets and cannot simply assess the market shares of the undertaking which enforced resale prices. In the case at hand, the Court concluded that significant anticompetitive effects could not be proven.

Different considerations regarding per se restrictions in the cases Gaba, BMW and Altimum

The Altimum case was decided by the FAC just one month after the BMW case in which it had fully confirmed its Gaba/Gebro case law and upheld the concept of per se restrictions.

Ultimately, the question is whether also in Switzerland a mere restriction by object can be prohibited and sanctioned or if also actual effects, i.e. the elimination or significant restriction of competition have to be proven.

Based on the current case law of the FAC, it seems that for vertical price fixing effective quantitative effects have to be proven in order to find an anticompetitive agreement whereas in case of vertical territorial restrictions (i.e. the hindering of parallel imports) proving an agreement or concerted practice would be sufficient. It remains to be seen if and how the Federal Supreme Court will clarify this apparent contradiction in its awaited Gaba/Gebro judgment.

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