NIEDERER KRAFT & FREY

Niederer Kraft & Frey Ltd
Bahnhofstrasse 13 CH-8001 Zurich
Telephone +41 58 800 8000 · Telefax +41 58 800 8080
nkf@nkf.ch · www.nkf.ch

Swiss Competition Law – Quo vadis?
Requirement of significant restriction on competition: Restriction on competition by object or effect?

23rd St.Gallen International Competition Law Forum ICF

20 May 2016

Nicolas Birkhäuser

NKF

Overview Case Law of Competition Commission (COMCO) and Federal Administrative Court (FAC)

Overview over some cases of COMCO and FAC

Case	COMCO	FAC
Gaba/Gebro	▪ 30 November 2009 ▪ significance +	▪ 19 September 2013 ▪ significance + (per se prohibition)
Fensterbeschläge	▪ 18 October 2010 ▪ significance +	▪ 23 September 2014 ▪ significance –
BMW	▪ 7 May 2012 ▪ significance +	▪ 13 November 2015 ▪ significance + (per se prohibition)
Altimum	▪ 20 August 2012 ▪ significance +	▪ 17 December 2015 ▪ significance –
Harley-Davidson	▪ 24 September 2013 ▪ significance –	
Kosmetikprodukte	▪ 21 October 2013 ▪ significance –	
Türprodukte	▪ 17 November 2014 ▪ significance +	

+ = significance affirmed / **–** = significance denied

Case Law of Federal Administrative Court (FAC)

FAC: Gaba/Gebro (i)

FAC Decision B-506/2010 (Gaba) and B-463/2010 (Gebro) of 19 September 2013 – per se prohibition (per se significance):

- Reference to case law of Swiss Federal Supreme Court regarding Sammelrevers (BGE 129 II 18): Significance to be assumed when respective agreement affects a relevant competition parameter and the participants have a significant market share, in casu 90% (E.11.1.5).
- Nevertheless, according to the FAC, *qualitative* significance is sufficient because due to the presumption of Art. 5 Para. 4 CartA «a maiore ad minus» also the qualitative significance must be affirmed (E.11.1.8) and a significant restriction on competition must be assumed, irrespective of quantitative criteria, in particular, irrespective of market shares (E.11.3.4).
- Respective clause in license agreement to be qualified as absolute territorial sales restriction (absolute Gebietsschutzklausel) that must be regarded to be significant already by its nature (E. 11.2.3).
- The quantitative significance of the agreement is only assessed «for the sake of completeness» (E. 11.2.4).
- Reference to the EU: «hard-core restrictions» are not exempt, irrespective of the market shares, there is only a justification for grounds of economic efficiency (E.11.3.4).
- ⇨ Per se prohibition.

FAC: Gaba/Gebro (ii)

Comments:

- By this decision, the FAC rules «restrictions by object» or «per se prohibitions» that can, like in the EU, only be justified for reasons of efficiency.
- This does not comply with Art. 5 CartA, which stipulates that (only) «agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, and all agreements that eliminate effective competition are unlawful.» (emphasis added). Both tests must be applied.
- See below in Section «Per se prohibition or effects based approach?» why this decision is questionable, in particular, the issues:
  - The Swiss Constitution stipulates in Art. 96 an effects based approach (see below).
  - The CartA stipulates in Art. 1 regarding the purpose of the CartA an effects based approach (see below).
  - The CartA stipulates in Art. 5 an effects based approach.
  - A proposed revision of the CartA that precisely wanted to introduce per se prohibitions was dismissed.

FAC: Fensterbeschläge (i)

FAC Decisions B-8404/2010, B-8399/2010 and 8430/2010 of 23 September 2014 – significance denied:

- It must be established in each single case (case by case) that competition is significantly affected by the agreement in question (B-8399/2010, E. 6.1.3).
- There is no per se prohibition (and no per se significance) under the CartA (B-8399/2010, E. 6.1.3).
- The FAC holds that the assessment whether there was an agreement that significantly affected competition must include the following:
  - There must be a causal link between the investigated conduct in question (exchange of information) and the market conduct (setting of price).
  - The agreement must be causal for the restriction on competition (B-8399/2010, E. 5.3.2.5 ff., 5.4.22 ff.).
  - Competition must be actually affected by the agreement in question (B-8399/2010, E. 6.1.3).
- The relevant market must be determined and assessed. Only this allows to assess whether and to what extent competition is significantly affected (B-8399/2010, E. 6.2.1 ff.).

FAC: Fensterbeschläge (ii)

Comments:

- The FAC explicitly states that there are no per se prohibitions (and no per se significance) under the CartA.
- The FAC actually assesses and determines the effects on competition.
- Only if competition is actually affected by the agreement in question, is there an infringement of Art. 5 CartA.
- The FAC did not refer to the previous decisions of the FAC regarding Gaba/Gebro (it later did in its decision regarding Altimum).
- See below in Section «Per se prohibition or effects based approach?» why this decision complies with the principles of the Swiss Constitution and of the CartA.

FAC: BMW (i)

FAC Decision B-3332/2012 of 13 November 2015 – per se prohibition (per se significance):

- No reference to the practice of the Swiss Federal Supreme Court regarding Sammelrevers (BGE 129 II 18) in connection with Art. 5 CartA any more (different to decision regarding Gaba/Gebro) – reference only in connection with Art. 4 CartA and without the part that «the participants (in an agreement) must have a significant market share» (E.2.2.3).
- Significance must in principle be assessed based on qualitative and quantitative criteria. – However, this practice must be restricted in case of territorial restriction clauses according to Art. 5 Para. 4 CartA that are particularly problematic agreements (E.9.1.4).
- If the CartA stipulates for certain agreements the presumption that they eliminate effective competition (i.a., Art. 5 Para. 4 CartA), it must be assumed «a maiore ad minus» that they also significantly affect competition (E.9.1.4).
- Quantitative significance does not need to be assessed. The question of quantitative significance is only assessed «for the sake of completeness» (E.9.1.5, E.9.2, E.9.2.2.6.1).

FAC: BMW (ii)

Comments:

- By this decision, the FAC rules «restrictions by object» or «per se prohibitions» that can, like in the EU, only be justified for reasons of efficiency.
- This does not comply with the effects based approach stipulated by the Swiss Constitution and the CartA (see below). – Cf. the methodology applied by the FAC in the matter Altimum.
- The quantitative significance was not really assessed: To assess the effects the FAC would have had to assess whether and, if so, how many dealers complied with export restriction.
- Effects: (i) Assuming an average share of the parallel imports in the total sales in Switzerland of 7-8%, the effect would for this sole reason be limited. However, this is not the end: (ii) Only parallel imports of BMW and MINI cars were alleged (thus leaving the entire rest of the market unaffected; it is known that many manufacturers are on the market). Thus, if only 7-8% of the market share of BMW is affected, the actual effect is limited to a percentage of approx. 1% or less. – (iii) In addition, it was established that hundreds of parallel imports of BMW and MINI cars were actually made compared to only 16 complaints to COMCO by consumers. – Cf. the methodology applied by the FAC in the matter Altimum.
- Agreements affecting approx. 1% or less of the market should not be held to significantly affect competition.
- It should be questioned whether a sanction of CHF 157 million based on this legal basis and these facts does comply with the basic principles of criminal law.

FAC: Altimum (i)

FAC Decision B-5685/2012 of 17 December 2015 – significance denied:

- Reference to the practice of the Swiss Federal Supreme Court regarding Sammelrevers (BGE 129 II 18): both, qualitative and quantitative criteria must be assessed (E.6.3.2, E.6.3.4).
- From the presumption of elimination of competition of Art. 5 Para. 4 CartA «a maiore ad minus» the presumption of significance can be deduce (not significance itself). HOWEVER, if the presumption of Art. 5 Para. 4 CartA can be rebutted, the presumption of significance must necessarily be rebuttable, too (E.6.3.4).
- A strong market position of the manufacturer is required (in casu 70-80%, 60-70%), but it is not sufficient for assuming significance. It must be determined which percentage of the agreements was actually followed (E.6.4.3).
- The FAC determined the following criteria for the analysis of significance:
  - Strong market position of the manufacturer (in casu 70-80%, 60-70%).
  - Level of compliance by the distributors (in casu 39 of 333 distributors = 12% of the distributors).
  - Market shares of those distributors who comply (in casu 12% of 60-70% or 70-80% = 7.2 or 9.6%).

FAC: Altimum (ii)

Comments:

- The FAC assesses whether the agreement in question did significantly affect competition in the sense of Art. 5 Para. 1 CartA. The FAC concludes that, despite qualitative significance, the agreement did, due to a lack of qualitative significance, not significantly affect competition.
- This decision of the FAC is the first decision concerning the issue of significance to refer to all pertinent previous decisions of the FAC.
- It may be questioned whether the FAC is considering a different treatment of agreements regarding price and agreements regarding territories: As far as can be seen, this should not be assumed:
  - The FAC holds that, if the legal presumption of elimination of competition according to Art. 5 Para. 4 CartA can be rebutted, the presumption of significance deduced from it must necessarily also be rebuttable. – This logic applies equally to agreements regarding prices and agreements regarding territories.
  - All cases of the FAC in question relate to facts that fall under Art. 5 Para. 4 CartA.
  - The CartA does not provide different criteria for the assessment of significance.
  - Agreements regarding territories are not more harmful than agreements regarding prices.

Per se prohibition or effects based approach?

Per se prohibition or effects based approach?

The Swiss Constitution stipulates an effects based approach:

- The Swiss Constitution stipulates in Art. 96 that «the Confederation shall **legislate against the damaging effects in economic or social terms** of cartels and other restrictions on competition.»
- Thus, the Swiss Constitution stipulates a competition law that is directed against damaging effects – that is, an **effects based approach**. Competition law in Switzerland does not prohibit cartels and other restrictions on competition as such, but only their actual damaging effects. Conducts can only be prohibited if they actually significantly restrict competition.
- There is no scope to argue that the effects based approach requires a **thorough examination**, which we would prefer not to undertake.
- It should always be kept in mind that prohibiting a conduct based on the CartA means that **the state intervenes and restricts private autonomy** as well as the **constitutional right of economic freedom**. This must be done cautiously and only to the extent that there are damaging effects on competition. – Where there are no damaging effects, there is no need and no justification to intervene.
- **Conducts that do not significantly restrict competition are lawful under Swiss law**.

Per se prohibition or effects based approach?

The Swiss Cartel Act (CartA) stipulates an effects based approach:

- Art. 5 Para. 1 CartA reads: «Agreements that significantly restrict competition in a market for specific goods or services **and** are not justified on grounds of economic efficiency, and all agreements that eliminate effective competition are unlawful.» (emphasis added).
- Thus, the wording of Art. 5 Para. 1 CartA is clear. It stipulates that (only) agreements that (i) significantly restrict competition **AND** (ii) are not justified on grounds of economic efficiency are unlawful.
- The (i) test whether a conduct significantly restricts competition and has damaging effects is **not the same as** the (ii) test whether a conduct is justified on grounds of economic efficiency.
- E.g., a price or territorial agreement (in particular a vertical one) can well have no effects on competition: **As long as there are (cheaper) competing products on the market, it can hardly be argued that competition does not function**. Competition often also lies between products of different brands.
- Conducts that do not significantly restrict competition and have no damaging effects are lawful and must not be prohibited, irrespective of whether they are efficient or not.
- **Only if competition is significantly restricted** and if there are damaging effects, the question must be assessed whether certain conducts should nevertheless be permitted due to economic efficiency.

Per se prohibition or effects based approach?

Practice of the Swiss Competition Commission (1):

- The Swiss Competition Commission has, in its previous practice, **in some cases decided that conducts** that fall under Art. 5 Para. 4 CartA **did not significantly restrict competition and therefore were lawful**, such as in the cases:
  - Harley-Davidson, report of 24 September 2013, RPW 2013/3, 285
  - Kosmetikprodukte, decision of 21 October 2013, RPW 2014/1, 184
- In the case of **Harley-Davidson**, COMCO decided that the territorial restrictions according to Art. 5 Para. 4 CartA did not have significant effects and did not significantly restrict competition – despite strong market power – due to market shares of 12-15% in total and 29% on the relevant market, strong actual competition, limited imports of the products, limited incentives for imports from the USA, and due to free access to the EEA (Para. 208).
- In the case of **Kosmetikprodukte**, COMCO decided that neither agreements on absolute territorial restrictions and the impediment of online trading nor price recommendations were quantitatively significant, in particular, due to too small market power and small market shares (Para. 229-237).
- Thus, the conducts in question were **found to be lawful** because they did not quantitatively significantly restrict competition – **not because they were justified**.

Per se prohibition or effects based approach?

Practice of the Swiss Competition Commission (2):

- These decisions were rendered **after** the decisions of COMCO regarding Gaba/Gebro and BMW and **before** the respective decisions of the FAC.
- **Should**, after the decisions of the FAC in the matters Gaba/Gebro and BMW, **this assessment based on the effects not be possible any more?**
- **How should conducts** like in the cases Harley-Davidson and Kosmetikprodukte **be held to be lawful and not be sanctioned?** They can regularly not be justified for reasons of economic efficiency. – Should it be based on **discretionary prosecution principle** (Opportunitätsprinzip)?
- Or should, like in the decision of COMCO regarding Türprodukte, **12,946 invoices be assessed with the finding that there were no indications** that the alleged agreements had been complied with and that they had any effects on competition, **but nevertheless with the legal qualification that the alleged agreements had significantly affected competition** in the sense of Art. 5 Para. 1 CartA and were to be sanctioned?
- **Conclusions:** (i) There is a clear constitutional basis in Art. 96 of the Constitution, (ii) there is a clear purpose of the CartA stipulated in Art. 1 CartA, (iii) there is a clear wording in Art.5 CartA, and (iv) a proposed revision of the CartA that wanted to introduce per se prohibitions was dismissed. – Why should we act against this and interpret the CartA as if there were per se prohibitions that can only be justified for grounds of economic efficiency?

Per se prohibition or effects based approach?

Not more intervention than necessary / not more fines than necessary:

- Conducts that do not significantly restrict competition are lawful under Swiss law.
- Apart from the legal arguments, one step back:
  - Increasing amount of regulation.
  - Increasing intervention by the state.
  - What if there was market design?
  - Who pays for the fines?
- True liberal thinking.
- Intervention only where there really is a need to intervene.
- **All we want is competition.**

NIEDERER KRAFT & FREY

Niederer Kraft & Frey Ltd
Bahnhofstrasse 13 CH-8001 Zurich
Telephone +41 58 800 8000 · Telefax +41 58 800 8080
nkf@nkf.ch · www.nkf.ch

Thank you for your attention!

NKF