

Competition law

Recent case law Group of Companies and Vertical Restraints

Dr. Hubert Orso Gilliéron

AIBL Luncheon - 31 October 2014

Baker & McKenzie Geneva is a member firm of Baker & McKenzie International, a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organisations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

© 2014 Baker & McKenzie Geneva

Agenda

Agenda

- Libor, Tibor, Euribor
- Costa Kreuzfahrten
- Hors Liste Medecine
- Dermatologica
- Harley Davidson
- Gaba

- LIBOR, TIBOR, EURIBOR, DPC 2013/4, pp. 697 ff.
- Federal Administrative Tribunal
- Duty to cooperate

Group of companies

Group

- Notification of a decision to the Swiss subsidiary (formal addressee) of a foreign holding company (material addressee)



Group

- Duty to cooperate (40 CartA)
 - Swiss subsidiary must transfer the requests from the Comco to the foreign holding company and communicate the answers received
 - If it does so, no sanctions possible against Swiss subsidiary and its corporate bodies
 - ⇒ no prejudice
 - ⇒ appeal not receivable (absence of interest)

Group

- Open questions
 - Validity of a notification to the formal addressee for the material addressee
 - Relevance of a foreign legislation limiting the communication of information to Swiss authorities
- Formal use of the theory of economic unity
 - ⇒ new juridical order without procedural guarantees?

Group

- Antitrust based on the notion of “undertaking”
 - economic activity
 - independence
- Group of companies
 - legal entities disregarded if
 - no economic independence
 - effective control
 - group = undertaking

Group

– Consequences

■ Agreements

- No “agreement between undertakings” within the group

■ Dominance

- Market power of the group taken into account to assess dominance

■ Merger control

- No merger control for internal restructurings

Group

– Consequences

▪ Calculation of fines

- Group turnover taken into account for calculation of fines
- Aggravation of fine if recidivism within the group

Group

– Consequences

- Addressee of a decision
 - Entity committing the breach
 - Parent company
 - Sister company
 - Combination of several legal entities

Group

– Consequences

■ Examples (Swiss case law)

- Publigroupe: allocation of liability of the subsidiary to the parent company
- BMW: allocation of liability for agreements among foreign entities to the German parent company
- Nikon: allocation of liability for agreements among foreign entities to the Swiss subsidiary
- French Books: subsidiaries only

Group

- Evolution from material assessment to procedural issues
- Risks in terms of fairness of procedures / effective defense
- Quid in terms of civil claims?

- Costa Kreuzfahrten, DPC 2013/4, pp. 476 ff.
- Secretariat, amicable settlement

Agency

Agency

- 4 steps analysis:
 - Personal scope of application
 - Existence of an agreement
 - Analysis of restraint
 - Justification

Agency

- Personal scope of application
 - One or several undertakings?
 - Central criterion = independence
 - Economic dependence
 - Organizational dependence
 - If several principals
 - no dependence
 - no theory of unity
 - two distinct undertakings

Agency

- Existence of an agreement
 - Agreement
 - Restrictive by effect or by object
 - ⇒ prices, prohibition of active/passive sales = by object

Agency

- Analysis of restraint
 - Price, territory = hardcore
 - Justification remains possible

Agency

- Justification on grounds of economic efficiency
 - Agency
 - Ownership of products remains with principal
 - Risks borne by principal
 - Justification
 - Price: yes, not on commissions due to the agent
 - Territory: possible if on the basis of objective and uniform criteria
 - ❖ Caveat: agency must not be abusive + take into account all relevant circumstances (Switzerland, market shares, structure of the market)

Agency

- EU Guidelines on Vertical restraints
 - No application of 101 TUE if
 - No ownership of goods
 - No risk borne by agent
 - ⇒ Price, territory, clientele
 - Application of 101 TUE for
 - Exclusivity, non compete
 - Justification / block exemption
 - Collusion among principals

Agency

- Different approach in Switzerland
- Main criteria = economic independence of the agent
- Territorial restraints likely difficult to justify
- Risk that agency agreements are considered as abusive means to achieve:
 - Resale price maintenance
 - Customers allocation
 - Territorial protection

- Hors-Liste Medecine, DPC 2013/4, 704 / 740: Federal Administrative Tribunal
- Harley-Davidson Switzerland GmbH, DPC 2013/3, 285: Secretariat
- Dermatologica, DPC 2014/1, 184: Secretariat
- Gaba, DPC 2013/4, 808: Federal Administrative Tribunal

Distribution

Hors-Liste Medecine

- CartA not applicable if
 - Explicit or implied exclusion by a legal or regulatory provision
 - De facto exclusion as a result of legal or regulatory provisions
- Exclusion of advertisement for medicine prevents effective intrabrand competition, in particular where 'shame factor' present

Hors-Liste Medecine

- No agreement in the meaning of Art. 4 I CartA if no competition on the relevant market

Hors-Liste Medecine

- Medecine under medical prescription
- Focus on intrabrand competition
- No answer on recommended prices
- Argument pertaining to the preexistence of effective competition

Hors-Liste Medecine

- Still uncertainty
 - Hors-liste remains the only case law decided by Comco
 - Follow-up
 - Price differences between CH-neighbouring countries
 - Latest decisions of Secretariat more in line with EU practice
 - Need for pressure or incentives
 - Follow-up rate not decisive by itself

Harley Davidson

- Export ban on Internet sales from the USA for motorcycles and accessories
 - Art. 5 IV CartA applicable
 - Presumption rebutted
 - No significant restraint due to
 - High transportation and homologation costs (motorcycles)
 - Low market shares and intense inter-brand competition (accessories)
 - Intense intra-brand competition with the EU dealers

Dermatologica

- Agreement included:
 - Recommended resale prices
 - Territorial and customer restraints
 - Ban on Internet sales
- Agreement with subsidiaries included:
 - Obligation to cause retailers to abide with the above restraints
- No illicit agreement and no sanction due to
 - Absence of effects on the market (low market shares and limited turnover)

Gaba

- License agreement whereby
 - manufacturer refrains from selling, directly or indirectly, into Austria
 - licensee refrains from selling, directly or indirectly, outside Austria

Gaba

- Agreement (4 I CartA)
 - cooperation between two independent undertakings
 - object or effect to restrain competition
 - ✓ no effect needed
 - ✓ intent of the parties irrelevant
 - implementation of the clause irrelevant

Gaba

- Territorial scope
 - CartA applicable to general export bans out of a specific country, if no exception for exports into Switzerland
 - No demonstrable effects in Switzerland needed, as long as such effects are likely to occur due to the nature of the agreement
 - Intensity of the effect analysed under 5 CartA

Gaba

- Presumption of 5 IV CartA applicable if the object of the agreement falls within the scope of this provision
 - No effects needed
- Presumption of 5 IV CartA for direct and indirect absolute territorial protection
 - No need to specifically target Switzerland

Gaba

- License agreement
 - pure IP clauses outside the scope of CartA
 - other clauses within the scope of CartA, notably those pertaining to the distribution of products
 - No abuse of IP to circumvene CartA

Gaba

- Presumption of 5 IV CartA rebutted if sufficient intra- and/or inter-brand competition
- If presumption rebutted,
 - significant restraint to competition (5 I CartA)
 - no quantitative analysis needed
 - possibility to justify on grounds of economic efficiency (5 II CartA)

Gaba

- Selective distribution systems justified if
 - needed due to the nature of the product
 - selection of retailers based on objective criteria
 - selection of retailers based on uniform criteria
 - criteria applied consistently
 - criteria appropriate to achieve their legitimate purpose
- Analysis includes
 - past practice
 - system in place in other countries

Gaba

– Sanction

- Agreements falling within the scope of 5 IV CartA can be sanctioned by a fine in the event of the rebuttal of the presumption
- Compliance programs:
 - Do not impact the principle of the sanction
 - Must be performant to justify reduction of fine
 - In casu, program should have detected the illicit restriction
=> not considered

Gaba

- FAT partially confirms past practice of Comco:
 - If presumption rebutted
 - qualitative impediment assumed
 - possibility to justify on grounds of economic efficiency
 - **BUT no need to analyse quantitative effects**
 - direct sanction possible
 - ⇒ *de facto* **by object** approach
 - ⇒ FAT anticipated CartA revision

Gaba

- Gaba clear, however
 - CartA revision blocked
 - Recent decision of FAT (windows fitting cartel) whereby the implementation in practice of the restrictive agreement must be proven

⇒ uncertainty regarding quantitative effects
- Practical impact
 - Harley Davidson / Dermatologica

Conclusion

Conclusion

- Recommended resale prices still unclear
 - Risk in the event of a high follow-up rate
- Territorial protection
 - General export bans out of a specific country fall within the scope of Art. 5 IV CartA
 - Need to address Switzerland in a contract
- Selective distribution
 - Justification for hardcore restraints
 - Possible only if selective distribution justified

Conclusion

- Group
 - expansion of the scope of application of the theory of economic unity
 - increased risk of forum shopping for administrative (and civil?) proceedings
- Verticals
 - “Swiss finish” triggers lack of predictability for firms
 - Switzerland must be taken into account abroad