

Competition & Antitrust - Switzerland

Resellers of door mountings fined for alleged price fixing

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According to a recent Competition Commission decision (November 17 2014), five resellers of door mountings met on an annual basis between 2002 and 2007 to fix minimum margins to be observed in the resale of their products. In 2007 another company participated in this annual meeting. The agreement related to products manufactured by one specific manufacturer. According to the commission, the participants agreed to observe certain margins in the resale of mountings to door manufacturers.

The commission found that the agreement constituted an illegal price-fixing arrangement among competitors and fined the resellers a total of Sfr185,500, although there was no proof that the parties' behaviour actually had a negative effect on prices. The first company to report the agreement to the authority benefited from total immunity under the leniency programme. As far as the manufacturer was concerned, the procedure was closed without any penalty, as the commission concluded that a violation of the Cartel Act could not be established against it.

The door mountings decision contradicts previous commission case law on the application of Article 5 of the Cartel Act. Article 5(1) provides that an agreement is unlawful only if it significantly restricts competition and is not justified on grounds of economic efficiency or eliminates effective competition. According to previous commission case law, an agreement was thus prohibited only if it had at least some actual negative effect on competition. The commission has based its new interpretation of Article 5 in its November 17 2014 decision on two Federal Administrative Court judgments (*Gaba v Competition Commission* and *Gebro v Competition Commission*, December 19 2013) regarding an alleged prohibition of parallel imports of Elmex toothpaste into Switzerland contained in a contract between manufacturer Gaba International AG and Gebro Pharma GmbH, its Austrian licensee. In *Gaba* and *Gebro* the Federal Administrative Court decided that the mere existence of vertical agreements for which the Cartel Act contains a presumption of elimination of effective competition (ie, vertical agreements on fixed or minimum prices or the allocation of territories) includes an irrefutable presumption that the agreement leads to a significant restriction of competition under Article 5(1), regardless of its actual effects on competition. In its November 17 2014 door mountings decision, the commission referred to *Gaba* and *Gebro* and concluded that not only vertical but also (or even more) horizontal agreements for which the act presumes an elimination of effective competition (horizontal agreements on prices, quantities and allocation of territories or customers) are prohibited, regardless of whether they actually have a negative impact on competition.

The commission's change in approach to Article 5 is surprising, not only because an appeal of *Gaba* and *Gebro* is pending before the Federal Court, but also because the Federal Administrative Court appeared to contradict its *Gaba* and *Gebro* decisions in two more recent judgments of September 23 2014 in a case relating to mountings for windows and window doors (for further details please see "[Federal Administrative Court annuls Competition Commission decision](#)"). In this case, the Federal Administrative Court confirmed that – in accordance with the prior to *Gaba* and *Gebro* generally accepted interpretation of Article 5 – a certain behaviour was, in light of the effects-based approach of Swiss competition law, inadmissible only if the authority could prove that the behaviour in fact led to an actual significant restriction of competition, regardless of the agreement's nature. Unfortunately, the Federal Administrative Court did not refer explicitly to *Gaba* and *Gebro* in the window and window-door mountings decisions. The window and window-door mountings case is pending before the Federal Court following an appeal by the Federal Department of Economic Affairs, Education and Research representing the commission in the appeal proceedings.

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