

Legal Compass

Competition Law

April 2020



COVID-19 and Competition Law

Introduction

Even in times of the COVID-19 pandemic, the competition authorities are obliged to monitor compliance with competition law. Although companies are currently facing many challenges, the competition law pitfalls must always be kept in mind. This concerns in particular cooperation agreements between competitors and/or companies at different market levels, but also the exchange of information.

This contribution intends to raise awareness of competition law issues even in such extraordinary times.

1. Exceptional situation calls for exceptional measures...

In the current extraordinary situation surrounding the COVID-19 pandemic, companies are facing ever greater challenges. It is, therefore, obvious that a company is also considering working (more closely) with its competitors and/or companies at different market levels in the current crisis.

Various countries have adopted measures to allow such cooperation or at least facilitate it.

For example, in the course of the COVID-19 pandemic, the UK government is temporarily relaxing elements of competition law as part of a package of measures to allow supermarkets to work together to feed the nation. The decision allows retailers to share data with each other on stock levels, cooperate to keep shops open, or share distribution depots and delivery vans. It would also allow retailers to pool staff with one another to help meet demand. In Denmark and Norway similar relaxations have been partly adopted or at least communicated by the competition authorities.

Another example is the joint research by pharmaceutical companies to find a vaccine against COVID-19.

2. ...but not in Switzerland for the time being

Such reliefs are currently not in force in Switzerland. On the contrary: in a recent media release, the Competition Commission (Comco) makes it clear that it will not tolerate the use of the corona crisis to restrict competition. The Comco expressly states that the challenges posed by the COVID-19 outbreak do not in general constitute a reason or justification for violations of antitrust law. The Comco also makes it clear that the competition authorities would intervene if necessary to foster competition. However, the Comco acknowledges at least that the current crisis may lead to an increased need for cooperation among companies. On the other hand, according to the Comco, the companies have to comply with antitrust law. The Comco sees an exception to the applicability of antitrust law if the government or authorities would order measures to combat the COVID-19 crisis that restrict competition.

Thus, at present, all the rules of the Swiss Federal Act on Cartels and other Restraints of Competition (Swiss Cartel Act) continue to apply without restriction. This can lead to uncertainty, as companies do not know what is permitted in the current extraordinary situation and what is not.

Author



Dr. Martin Rauber
Legal Director

3. Wide scope of application of the Swiss Cartel Act

In accordance with the international standard, Swiss competition law follows the so-called effects doctrine. It applies to facts that have an effect in Switzerland, even if they are initiated abroad. For a long time, the opinion prevailed in Switzerland - also based on the case law of the European Court of Justice - that these effects in Switzerland have to be direct, substantial and foreseeable in order for the Swiss Cartel Act to be applicable to transactions abroad.

However, in its Gaba decision, the Swiss Federal Supreme Court seems to have demurred from this opinion. It did not follow the parties' argument that the export ban which was subject of the proceedings does not have the necessary effect intensity in Switzerland. On the contrary, according to the Swiss Federal Supreme Court, "possible effects" of an agreement on the Swiss market would be sufficient to trigger the application of the Swiss Cartel Act. The examination of a certain intensity of an effect in Switzerland is, in the words of the Swiss Federal Supreme Court, not necessary and even not permissible.

By ruling that facts that are initiated abroad and only potentially have an effect in Switzerland, result in the application of Swiss Cartel Act, the Swiss Federal Supreme Court has brought about a significant tightening of the antitrust law. As a consequence, general export bans imposed on retailers anywhere in the world, regardless whether export to Switzerland has been explicitly prohibited or whether the ban was in fact implemented, fall within the scope of the Swiss Cartel Act.

Whether this extensive formulation of the Swiss Federal Court in the Gaba decision is deliberate and will be applied in the future must be observed on the basis of future developments and case law. In its later decision in the BMW case, the Swiss Federal Supreme Court confirmed that the decisive factor for the applicability of the Swiss Cartel Act was always the possibility, at least, of an impact that the activity could have in Switzerland, i.e. on the Swiss market. However, the Swiss Federal Supreme Court at least indicated that certain formulations in the Gaba decision were interpreted too broadly in practice.

4. Method of assessment for cooperation contracts

A large number of cooperation, which occur in the economy independently of the current COVID-19 pandemic, are unobjectionable from a competition law perspective. This may be because they do not constitute agreements affecting competition, do not eliminate or significantly restrict competition, or because the cooperation in question is justified on grounds of economic efficiency.

For a cooperation between several companies to fall within the focus of the Swiss Cartel Act and thus the Comco, there has to be first an agreement affecting competition, i.e. a legally enforceable or unenforceable agreement or concerted practice, which have the restraint of competition as their subject matter or effect.

If the cooperation agreement meets this qualification, it must either eliminate or significantly restrict competition. Since the Gaba decision of the Federal Supreme Court, even greater caution is required in the case of so-called hard core cartels, i.e. agreements between competitors concerning price, quantities, customers and/or territories. If such an agreement exists, the Comco does not have to prove, in principle, any effects of the agreement on the market. In other words, such agreements violate the Swiss Cartel Act, irrespective of the market shares of the companies involved. It is also irrelevant to what extent the agreement in question is actually implemented or what its actual effects on the relevant Swiss market are. If the Comco can prove the existence of such an agreement, the companies involved can only escape sanctions if they can provide sufficient evidence of grounds of economic efficiency.

As mentioned above, competition agreements may be justified in individual cases and under certain conditions. An agreement justified in this way is therefore permissible from the outset, both from administrative and civil law perspective. The economic necessity is often the basis for cooperation between companies. Accordingly, the Swiss Cartel Act expressly lists the reduction of production or distribution costs, the improvement of products or production processes, the promotion of research or the dissemination of technical or professional knowledge, as well as the more rational exploitation of resources as justifications for economic efficiency. It follows that research and development cooperation agreements,

specialization agreements or distribution agreements in particular may potentially benefit from this exception. In times of the COVID-19 pandemic, the reduction of production or distribution costs or the promotion of research in particular can provide the justification background for cooperation agreements. It should be noted, however, that cooperation is only admissible if it is necessary to achieve the above-mentioned reasons, i.e. if more moderate measures are not available to achieve the goal. Moreover, companies can only rely on these grounds of economic efficiency if the underlying cooperation does not eliminate effective competition. The focus of the relevant exception clause is, therefore, primarily on cooperation or contractual clauses which, although they can be qualified as agreements affecting competition in sense of Swiss competition law, do not qualify as hard core cartels. Although such agreements restrict competition to a certain extent, they also serve an economically sensible purpose.

5. What you can do and what you should not do

The competition authorities, probably by their very nature, approach cooperation between competitors with a general mistrust. Accordingly, companies are well advised to exercise caution when discussing business with competitors. This caution is also based on the fact that an agreement affecting competition within the meaning of the Swiss Cartel Act does not require an explicit or a binding agreement between several companies. Instead, concerted practices between companies or their business conduct may be sufficient to come into the focus of the regulator.

Agreements on market allocation, whether geographical or by customer, should be avoided. Such agreements, or even just understandings, appear to be particularly interesting in times such as the COVID-19 pandemic, when shortage of individual goods could become apparent, but they also entail massive antitrust risks.

Not least in view of the recently published press release of the Comco, agreements and concerted practices of any kind aimed at sealing off the Swiss market must be strictly prohibited. This includes, for example, agreements that could lead to export bans to Switzerland. For example, in distribution agreements it must always be ensured that parallel imports into Switzerland remain permissible.

In addition, agreements which lead to a direct or indirect price agreement should be avoided as well. In distribution agreements, agreements between companies at different market levels regarding second hand price fixing can then come into the focus of the competition authorities. The Comco interprets this offence relatively broadly. For example, the manufacturer's influence on the pricing policy of a distributor may be sufficient for the agreement to be qualified as illegal. Caution should also be exercised with regard to (supposedly non-binding) price recommendations, as these may be found inadmissible in individual cases. One might think, for example, of situations in which such recommendations, due to pressure or the granting of incentives, have de facto the effect of fixed prices.

Similar situations as described above may arise in the case of licensing agreements. Again, care should be taken with contractual clauses that restrict the licensee's freedom to determine the sales price. Equally sensitive are agreements that restrict production.

As mentioned above, many cooperation agreements can be justified on grounds of economic efficiency. Especially in times of the COVID-19 outbreak, cooperation agreements with competitors regarding research, development and/or licensing of new products or services can, thus, be interesting. The current pandemic can also be used as an opportunity to think about purchasing cooperation agreements or sales cooperation agreements. In all these cases, it is worthwhile to examine the admissibility of such cooperation agreements from an antitrust perspective.

6. Information exchange agreements in particular

The issue with the antitrust assessment of agreements on information exchange is that, depending on their form, they may promote or restrict competition. Thus, the exchange of information leads to market transparency which, on the one hand, can promote competition by enabling competitors to adapt more quickly to real market conditions. On the other hand, such market transparency can promote illicit interaction between competitors.

Generally, an exchange of information is problematic if it concerns information which, according to the Comco, «reduces strategic uncertainty in the market».

Like an agreement affecting competition, an information exchange agreement must have as its object a restriction of competition. The subjective intention of the parties to the agreement is irrelevant. What is decisive is whether the information exchange in question is objectively capable of restricting competition.

Finally, the exchange of information must in fact have the effect of restricting competition. It is sufficient if the exchange of information is likely to have appreciable negative effects on at least one parameter of competition such as price, quantity, quality or innovation.

Since even an implicit coordination of business conduct may be sufficient to attract the attention of the regulator, in particular the exchange of sensitive information should be avoided.

In particular, the Comco considers that the exchange of business secrets is a clear indication of a restrictive and therefore illegal exchange of information.

Similarly, the exchange of information on capacity, both in relation to one's own industry and to the industry in general, should be avoided. Such exchange of information also has the serious potential to be qualified as an unlawful agreement affecting competition, in particular as a concerted practice.

In principle, historical and aggregated data may be exchanged, provided that the parties cannot draw conclusions from this exchange as to the current or future business strategy of individual competitors. Whether and to what extent the risk of such conclusions exists must be assessed on the basis of each individual case.

Also the exchange of data, which is very difficult to draw conclusions about individual, company-specific data (so-called aggregated data) is generally considered as unproblematic.

7. Compliance is right and important

In times of crisis, companies face many challenges that can lead competitors to overcome these challenges together. It is often simply a matter of pure survival. During such times, compliance with competition law might not feel a priority.

However, such behavior can be costly for a company. For example, certain agreements or conducts may result in fines that amount to millions (the Comco's sanctions go up to 10% of turnover the company achieved in Switzerland in the preceding three financial years). In addition, agreements that are considered illegal under antitrust law are also invalid under civil law. This can lead to the invalidity of entire contracts. Finally, there is the threat of civil lawsuits, in particular claims for damages, from aggrieved market participants, not only in Switzerland, but above all abroad. Not to mention the certain reputational damage.

The above comments make it clear that even in difficult and extraordinary times of the COVID-19 pandemic, antitrust compliance must not be neglected. At the same time, however, the current Swiss Cartel Act also provides the basis for companies to work together in certain areas or, if necessary, to intensify existing cooperation in the present extraordinary period. In particular, the justification of economic efficiency must be considered in each individual case and it must be carefully examined whether such extraordinary cooperation can be permitted on such basis.

Your contacts for Competition Law



Daniel Bachmann
Partner

T: +41 31 328 75 75
daniel.bachmann@eversheds-sutherland.ch



Dr. Martin Rauber
Legal Director

T: +41 44 204 90 90
martin.rauber@eversheds-sutherland.ch

eversheds-sutherland.ch

The information contained in this document is intended for informational purposes only and cannot replace an appropriate legal advice. Eversheds Sutherland Ltd., with its legal domicile in Zurich (Switzerland), can take no responsibility for actions taken based on the information contained in this document.

© Eversheds Sutherland 2020. All rights reserved. Eversheds Sutherland is a global provider of legal services operating through various separate and distinct legal entities. Eversheds Sutherland is the name and brand under which the members of Eversheds Sutherland Limited (Eversheds Sutherland (International) LLP and Eversheds Sutherland (US) LLP) and their respective controlled, managed and affiliated firms and the members of Eversheds Sutherland (Europe) Limited (each an "Eversheds Sutherland Entity" and together the "Eversheds Sutherland Entities") provide legal or other services to clients around the world. Eversheds Sutherland Entities are constituted and regulated in accordance with relevant local regulatory and legal requirements and operate in accordance with their locally registered names. The use of the name Eversheds Sutherland is for description purposes only and does not imply that the Eversheds Sutherland Entities are in a partnership or are part of a global LLP. The responsibility for the provision of services to the client is defined in the terms of engagement between the instructed firm and the client. Eversheds Sutherland Ltd., with its legal domicile in Zurich (Switzerland), is a member firm of Eversheds Sutherland (Europe) Ltd.