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Pranvera Këllezi
pranvera.kellezi@kellezi-legal.ch
Attorney at law, Geneva

INSTITUT de droit de la concurrence
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Pranvera Këllezi*
pranvera.kellezi@kellezi-legal.ch
Attorney at law, Geneva

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ABSTRACT

Possible effects in Switzerland are sufficient to assert jurisdiction of Switzerland over conduct taking place outside Switzerland. The Supreme Court adopted a broad definition of the territorial scope of the Cartel Act, by not only refusing, but also prohibiting, to consider any level of intensity and probability of occurrence of effects in Switzerland. In addition, the Supreme Court established a restriction "by object" for agreements amounting to absolute territorial protection of the Swiss market. The unilateral expansion of the reach of the Swiss competition law operates as a means to integrate the Swiss market with the EU's single market and to open other markets to Swiss costumers. A form of comity is however necessary to balance the positive effects for Swiss consumers with adverse effects abroad, particularly with regard to sales from distant territories.

La simple possibilité que des effets puissent se produire en Suisse suffit pour créer une compétence de la Suisse s'agissant d'états de fait ou comportements qui se sont déroulés en dehors de la Suisse. Le Tribunal fédéral a adopté une définition large du champ d'application territorial de la loi sur les cartels, qui ne tient pas compte de l'intensité des effets en Suisse ou de la probabilité de leur occurrence. Le Tribunal Fédéral a au surplus établi une « restriction par objet » pour les accords établissant une protection territoriale absolue du marché suisse. Cette extension unilatérale de la portée du droit suisse a pour effet d'intégrer le marché suisse au marché unique européen et d'ouvrir d'autres marchés aux consommateurs suisses. Une forme de courtoisie internationale (comity) s'avère toutefois nécessaire afin de rétablir un équilibre entre les effets positifs de la portée étendue du droit suisse pour les consommateurs suisses et ses effets négatifs pour les entreprises étrangères, en particulier dans le cas des ventes depuis des territoires lointains.

* The author is a member of the Swiss Competition Commission. She prepared this article in her personal capacity. The views expressed are her own and do not reflect the views of the Swiss Competition Commission or its Secretariat.

1. The Federal Supreme Court of Switzerland has issued the reasoning behind an important ruling handed down in June 2016, whereby the prohibition of parallel imports from outside Switzerland was considered to restrict competition, as a rule, and be liable to fines (hereinafter "*Elmex* ruling").[1] It was specified that the "effects doctrine" embodied in the Swiss Cartel Act (hereinafter "Cartel Act"[2]) is not contrary to international law,[3] that only the substantial rules may determine what intensity such effects must have on the Swiss market, and that, as a rule, prohibition of parallel imports is unlawful. The ruling is significant regarding not only several pending cases, but also the future enforcement of Swiss competition law.

2. With regard to cross-border parallel trade between the EU and Switzerland, the ruling establishes a restriction "by object" for agreements amounting to absolute territorial protection of the Swiss market, integrating, as a result, the Swiss market with the EU's single market. This may result in the prohibition, as far as the Swiss market is concerned, of all agreements between suppliers and distributors that directly or indirectly prohibit exports outside the territory allocated to the distributor.

1 Federal Supreme Court (FSC), 28 June 2016, *Elmex*, case 2C_180/2014.

2 Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (Cartel Act, CartA), in force since 1 February 1996; RS 251.

3 On the territoriality principle, *see* L. Idot, Introduction, Is territoriality still meaningful? *Concurrences* No. 3-2016, pp. 27ff.

I. Introduction and context

3. This landmark decision was made when the competition law community celebrated the 20th anniversary of the Swiss Cartel Act. A little history is of interest to understand competition law and policy in Switzerland. The Cartel Act was enacted in 1995 and based on the EU model; to date, it has been construed to enable parallel and analogous application of EU and Swiss competition law to Swiss and European companies. In a curious way, from an institutional standpoint, a greater distance between the EU and Switzerland[4] was accompanied by the greatest interest in applying certain EU competition law dimensions, as if Switzerland were an EU Member State. The interest of Swiss discounters and retailers in taking advantage of the proximity and low prices of neighbouring Member States has increased in intensity and geographical scope by urging Swiss authorities to introduce and apply the strictest tests for the prohibition of absolute territorial protections. There is a perception of discrimination of Swiss consumers and a feeling of living in an *îlot de cherté*,[5] which is also the result of the high cost of living.

4. The Cartel Act of 1995 established a competition authority with broad investigative powers,[6] but did not provide for direct sanctions. Only infringements of an injunction made by the Competition Commission to stop an unlawful act could be sanctioned with fines. The law on restrictive agreements looked quite similar to EU competition law, with a (rebuttable) presumption that horizontal price fixing and market allocation that eliminated competition[7]; it did not include a similar presumption on verticals.

5. It was against this background that the Federal Supreme Court issued a landmark decision in 2002[8] concerning the German book market. A wide range of vertical agreements between publishers and booksellers, covering 90% of the Swiss book market in German and enforced by the Swiss booksellers' association, were considered a horizontal concerted practice and, therefore, covered by the presumption of illegality for horizontal price fixing.[9] The elimination of competition had to be considered by reference to a relevant market.[10] By the same token, the economic context of the agreement had to be considered, as well.

6. For the rebuttal of the presumption, the Federal Supreme Court confirmed an analysis aiming at detecting any remaining competition in the relevant market resulting from any parameter of competition, price, or quality.[11] After considering that the price was not the only important parameter in the market, and that booksellers competed against each other based on the quality of their services, the Federal Supreme Court rebutted the presumption of elimination of competition based on the quality of the services.[12] This part of the 2002 ruling on the rebuttal of the presumption remains unchallenged today.

7. The ease with which the presumption of elimination of competition was rebutted by the Federal Supreme Court, which came as a surprise at the time,[13] became the new legal standard. The low "rebuttal standard" applied also to the presumption of elimination of competition introduced in 2004, especially that resulting from the prohibition of parallel imports and resale price maintenance.[14] The presumption was, indeed, rebutted in numerous cases. Therefore, one starts wondering whether such presumptions are justified in the first place, since they are not confirmed by an observation of the actual elimination of competition in the market. Or the opposite: whether the ease of the rebuttal was a sensible thing for the Federal Supreme Court to do.

8. The reasoning of the Federal Supreme Court in 2002 reflects the actual difference between the wording of Article 5 of the Cartel Act and the wording of Article 101 TFEU: while the latter refers to the "*prevention, restriction or distortion of competition*" as a prohibition condition and to the elimination of competition as a disqualifying criterion of justification on efficiency grounds,[15] the Cartel Act distinguishes between "significant" restriction and "elimination" of competition and introduces a presumption of effects with regard to the "elimination" of competition. Based on the wording of the law, it makes sense to say that once the presumption of

4 Switzerland withdrew its application for EU membership on 16 June 2016; *see Swissinfo*, Parliament has voted to withdraw Switzerland's dormant application to join the European Union (available at swissinfo.ch).

5 *See* the current request for a popular initiative on fair prices: Initiative populaire fédérale "Stop à l'îlot de cherté – pour des prix équitables," available at https://www.admin.ch.

6 The Federal Competition Commission is an independent decision body. Its Secretariat is responsible for investigating restrictions of competitions at its own initiative and for preparing the draft decisions to be adopted by the Competition Commission.

7 Art. 5 para. 3 of the Cartel Act reads as follows: "*The following agreements between actual or potential competitors are presumed to lead to the elimination of effective competition: a. agreements to directly or indirectly fix prices; b. agreements to limit the quantities of goods or services to be produced, purchased or supplied; c. agreements to allocate markets geographically or according to trading partners.*"

8 FSC, 14 August 2002, *Sammelrevers*, joint cases 2A.298/2001 and 2A.299/2001, ATF/BGE 129 II 18. For a summary of the judgment, *see* C. Bovet, New competition rules and other related developments in Switzerland, *RDSA/SZW* 2004/2, p. 132, para. 14; for a summary of the facts of the case, *see* C. Bovet, Swiss Competition Law 1998–1999, *RDSA/SZW* 2000/2, p. 85, para. 6.

9 ATF/BGE 129 II 18, pt. 6.

10 ATF/BGE 129 II 18, pt. 7.2.

11 ATF/BGE 129 II 18, pt. 8.3. The analysis was based on three main elements: the state of competition among the participants to the agreement (inner competition), the state of competition coming from undertaking not participating in the agreement (outside competition), and barriers to entry. All these elements had to be considered in reference to the market analysis (*idem*, pt. 8.1 and 8.3).

12 ATF/BGE 129 II 18, pt. 9.5.5.

13 C. Bovet, Swiss Competition Law 1998–1999, *RDSA/SZW* 2004/2, p. 132, para. 14.

14 Art. 5 para. 4 of the Cartel Act, in force since 1 April 2004, reads as follows: "*The elimination of effective competition is also presumed in the case of agreements between undertakings at different levels of the production and distribution chain regarding fixed or minimum prices, and in the case of agreements contained in distribution contracts regarding the allocation of territories to the extent that sales by other distributors into these territories are not permitted.*"

15 Art. 101 para. 3 TFEU.

complete elimination of competition has been triggered, its rebuttal would be justified as soon as marginal and residual competition is shown.

9. Apart from introducing a presumption of the elimination of competition resulting from the restriction of parallel imports and resale price maintenance, the other major amendment of the Cartel Act in 2004 contained direct sanctions for agreements that were presumed to eliminate competition and abuse of dominant positions.[16] Still, unlike EU competition law, the Swiss Cartel Act does not provide for fines for all agreements restricting competition, but only for those agreements for price fixing, market partitioning, or restriction of parallel imports deemed to eliminate competition.

10. After 2004, the work of practitioners on hardcore cases naturally focused not only on the qualification of the agreement, but also on the rebuttal of the presumption of elimination of competition to escape fines. In *Elmex*, the Federal Supreme Court narrowed the difference with EU law by claiming that sanctions are triggered by proof of the conduct forming the basis of the presumption (i.e., the evidence of an agreement for price fixing or market allocation), not by the results of the presumption (i.e., elimination of competition). In other words, all agreements on price fixing, market allocation, and restriction of parallel imports are subject to fines, irrespective of the agreement's elimination of competition. For other types of agreements, only the infringement of a prohibition decision is liable to fines.

11. It is during the interpretation of Article 5 of the Swiss Cartel Act in its entirety that the *Elmex* judgment clarified not only the scope of sanctions, but also attempted to refine the concept and evidence of "significant restriction" of competition under Article 5 paragraph 1 of the Cartel Act, which is also relevant for defining the "effects doctrine" in view of the (extra)territorial reach of the Cartel Act.

II. The territorial reach of the Cartel Act: The "effects doctrine"

12. Article 2 paragraph 2 of the Cartel Act provides that: "This Act applies to practices that have an effect in Switzerland, even if they originate in another country." It defines the (extra)territorial dimension in the application of the Cartel Act.[17] The "effects doctrine" is embedded in the law and is, therefore, undisputable. The only point of debate was whether the "effects" should be of a certain intensity to justify Switzerland's jurisdiction to prescribe and, subsequently, enforce.[18] This is a main difference with the EU, in that the courts have preferred the "implementation doctrine" to assert their jurisdiction, with the "qualified effects" criterion being the exception.[19] The court will decide in *Intel*[20] whether to definitively adopt the "effects doctrine" as an alternative criterion.

13. As for the jurisdiction to prescribe, the Federal Supreme Court held that a country's need to protect its market from adverse effects cannot be abstractly defined without regard for the letter and the intent of the substantive provisions[21]—i.e., Articles 4 and 5 of the Cartel Act pertaining to restrictive agreements. This is reminiscent of the Opinion of the Advocate General in *Intel*, which makes Article 101 TFEU the starting point of assessing whether the "effects doctrine" is also applicable in EU law, as opposed to the implementation doctrine only.[22]

14. According to the Supreme Court, conduct taking place within Switzerland and outside Switzerland must be treated equally: there is no reason to require additional qualifications regarding the effects of conduct originating outside Switzerland.[23] By this statement, the Federal Supreme Court questions the very purpose of territorial jurisdiction. It then held that there is and can be no distinct assessment of the intensity or degree of "effects" of an action originating outside Switzerland under the "effects doctrine" laid out in Article 2 paragraph 2 of the Swiss Cartel Act.[24] The assessment of effects' intensity is unlawful.

15. The Federal Supreme Court carries out a brief assessment of the contractual provision prohibiting exports. The fact that the agreement authorised the Austrian licensee to manufacture and distribute

16 Art. 49a para.1 refers to Art. 5 para. 3 and 4 of the Cartel Act: "*Any undertaking that participates in an unlawful agreement pursuant to Article 5 paragraphs 3 and 4 or that behaves unlawfully pursuant to Article 7 shall be charged up to 10 per cent of the turnover that it achieved in Switzerland in the preceding three financial years*." For an overview of amendments introduced in 2004, *see* C. Bovet, Swiss Competition Law 1998–1999, *RDSA/SZW* 2004/2, p. 132, para. 3–12.

17 *Elmex*, case 2C_180/2014, pt. 3.2.1.

18 We will limit the present contribution to the jurisdiction to prescribe.

19 *See* L. Idot, Introduction, Is territoriality still meaningful? *Concurrences* No. 3-2016, p. 29.

20 Case C 413/14 P.

21 *Elmex*, case 2C_180/2014, pt. 3.2.3.

22 Opinion of Advocate General Wahl delivered on 20 October 2016, case C 413/14 P, *Intel*, para. 288 and 289: "*To determine whether the Commission can apply EU competition rules to specific conduct, the starting point must be the wording of Articles 101 and 102 TFEU. Far from affording the Commission* carte blanche *to apply EU competition law to behaviour wherever it occurs and no matter whether it has any clear link to the EU territory, those provisions are concerned with collective or unilateral anticompetitive conduct* within the internal market*: Article 101 TFEU prohibits agreements or practices 'which have as their object or effect the prevention, restriction or distortion of competition within the internal market'; and Article 102 TFEU, for its part, prohibits 'any abuse … within the internal market'. The jurisdictional rule for the application of EU competition rules is thus clearly embedded in those provisions. Although Article 102 TFEU is somewhat less clear, Article 101 TFEU is very explicit in that it applies to any conduct that has* anticompetitive effects *on the internal market*" (emphasis in the original).

23 *Elmex*, case 2C_180/2014, pt. 3.3.

24 *Elmex*, case 2C_180/2014, pt. 3.7: "*die Prüfung einer bestimmten Intensität der Auswirkungen ist im Rahmen von Art. 2 Abs. 2 nicht notwendig und auch nicht zulässig*."

the toothpaste Elmex exclusively in Austria and prohibited direct or indirect exports to other countries was sufficient to find possible effects in the Swiss market, since Switzerland was covered by the wording "other countries."[25] It was confirmed that "indirect" meant passive sales.[26] An express contractual prohibition of exports towards Switzerland is, therefore, not necessary. Here again, the judgment does not refer to the quality or intensity of such effects, but only the occurrence of such effects in Switzerland. The mere possibility of such an occurrence is enough to assert jurisdiction.[27] The position adopted by the Swiss Federal Court is different from that adopted by European courts on the "effects doctrine," requiring a sufficient probability[28] that the agreement causes "*immediate, substantial and foreseeable effect in the European Union*."[29]

16. The intensity of effects within the ambit of the Swiss "effects doctrine" being, thus, of no help, the concept of "significant restriction of competition" under Article 5 of the Swiss Cartel Act is relevant for the conduct of business undertakings taking place outside Switzerland. However, before turning to the concept of "significant restriction of competition" (Section III below), a few words are necessary to clarify how the Federal Supreme Court reached the conclusions above.

17. Two pleas were raised by the plaintiffs: the failure to consider actual effects of conduct occurring outside Switzerland was contrary to international law, and to the free-trade agreement between the EU and Switzerland (hereinafter "FTA").[30] The arguments related to the source of authorisation or proscription of domestic jurisdiction under customary international law or a conventional rule that directly binds the countries where the undertakings are based. Raised as a defence,[31] the question of authorisation naturally turned to whether international law or the convention precluded Switzerland from asserting its jurisdiction.

18. First, the Federal Supreme Court considers that the current state of international law does not prevent a state from prescribing rules applicable to conduct taking place outside its territory.[32] Indeed, neither international law principles nor international law enforcement mechanisms have tools to stop a country from adopting far-reaching extraterritorial rules, unless countries entered into a treaty. The only response to the assertion of one country jurisdiction is the unilateral exercise of sovereignty by other countries, such as the adoption of blocking statutes regarding jurisdiction to enforce.[33]

19. The Supreme Court recognises that international law requires sufficient connection. While discussing the requirement of connection or genuine link, the Federal Supreme Court held that such a connection between conduct taking place outside its borders and its substantial provisions should be sufficient—in the form of real, substantial, and sufficient connection.[34] However, in establishing the requirements of the sufficient connection, the Supreme Court simply fails to give a meaningful definition, saying that, under international law, the existence of the "effects doctrine" constitutes a genuine link to facts taking place outside one's territory.[35] Additionally, when applying it to the actual facts of the case, the substance of such a genuine connection shrinks into a mere possibility of having an effect in Switzerland without investigating whether such effects (of whatever intensity) are probable.

20. The second plea related to the FTA was rejected on the grounds that the FTA does not proscribe the setting of extraterritorial conduct under the Swiss Cartel Act.[36]

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25 *Elmex*, case 2C_180/2014, pt. 3.4.

26 *Elmex*, case 2C_180/2014, pt. 3.4 and 6.4.3.

27 *Elmex*, case 2C_180/2014, pt. 3.4: "*Damit wird möglicher Wettbewerb in Bezug auf Elmex rot auf dem schweizerischen Markt unterbunden, wie die Vorinstanz und die WEKO zu Recht festhalten. Insofern sind durch das Verhalten der Beschwerdeführerin und der Gebro* mögliche Auswirkungen *auf dem Schweizer Markt gegeben*" (emphasis in the original).

28 GCEU, 12 June 2014, *Intel*, case T-286/09, pt. 256 and 257, referring to *Javico*, 28 April 1998, case C-306/96, pt. 16 and 18; actual effects are not required, but a sufficient probability that the agreement at issue is capable of having a more than insignificant influence in the EU.

29 GCEU, 12 June 2014, *Intel*, case T-286/09, para 243; CFI, 25 March 1999, *Gencor*, case T-102/96, pt. 90: "*Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community*." *See* the explanation of the Advocate General in *Intel* (case C 413/14 P), pt. 299 and 300: "*That does not mean, however, that any effect, no matter how weak or indirect, could trigger the application of EU competition rules. In a globalised economy, conduct that takes place anywhere in the world, for example in China, will almost inevitably have some sort of effect in the European Union. Yet, the application of Articles 101 and 102 TFEU cannot be based on a link or effect that is too remote or purely hypothetical. I consider it to be particularly important that jurisdiction is asserted with restraint in relation to behaviour that has not, strictly speaking, taken place within the territory of the European Union. Indeed, to comply with a certain form of comity and, by the same token, to ensure that undertakings can operate in a foreseeable legal environment, it is only with a great deal of caution that the effect of the conduct complained of can be used as the yardstick for asserting jurisdiction. That is all the more important today. There are over 100 national or supranational authorities worldwide that claim jurisdiction over anticompetitive practices.*"

30 Agreement between the European Economic Community and the Swiss Confederation, OJ 1972 L 300, p. 189, RS 0.632.401.

31 This is similar to the questions submitted before the Permanent Court of International Justice in the Lotus case (judgment of September 7, 1927, case S.S. "LOTUS").

32 *Elmex*, case 2C_180/2014, pt. 3.5: "*Über ein Verbot exzessiver Rechtssetzung (i.S. der jurisdiction to precribe) durch einen Staat reicht das Völkerecht nach dem gegenwärtigen Stand nicht hinaus*."

33 Blocking statutes are measures designed to prevent domestic companies from complying with orders or judgments emanating from foreign jurisdictions; it concerns the jurisdiction to enforce. *See* for the concept (Introduction, p. xvii) and examples, V. Lowe, *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials*, Grotius 1983.

34 *Elmex*, case 2C_180/2014, pt. 3.5: "*Sie unterliegen allerdings völkerrechtlichen Beschränkungen, namentlich durch das allgemeine Prinzip des Völkerrechts, wonach zwischen dem normierenden Staat und dem von ihm normierten Auslandssachverhalt eine echte Verknüpfung (genuine link, sufficient connection) vorliegen muss, mit dem der erfasste Auslandssachverhalt echt oder substantiell und hinreichend verknüpft sein muss*."

35 *Elmex*, case 2C_180/2014, pt. 3.5. Whether the *Lotus* case law is applicable to competition law cases was left open (the Permanent Court of International Justice, judgment of 7 September 1927, case S.S. "LOTUS"). The *Lotus* case was a criminal one and is understood to permit extraterritorial prescriptive jurisdiction unless countries adopt conventional rules prohibiting it (*see* C. Ryngaert, *Jurisdiction in International Law*, OUP 2008, p. 27ff; *see Lotus* case, pp. 18–19).

36 *Elmex*, case 2C_180/2014, pt. 8. Article 23 of the FTA reads: "1. *The following are incompatible with the proper functioning of the Agreement in so far as they may affect trade between the Community and Switzerland: (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings that have as their object or effect the prevention, restriction or distortion of competition as regards the production of or trade in goods; (ii) abuse by one or more undertakings of a dominant position in the territories of the Contracting Parties as a whole or in a substantial part thereof; (iii) any public aid that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods. 2. Should a Contracting Party consider that a given practice is incompatible with this Article, it may take appropriate measures under the conditions and in accordance with the procedures laid down in Article 27*."

The FTA itself, according to the Supreme Court, aims at achieving a free trade area between the EU and Switzerland, and private contracts should not go against this objective; both contractual parties are entitled to develop independent practices in relation to Article 23 FTA (with regard to competition rules). No word is included on the effect of trade criterion of Article 23 FTA. Should the effect on trade criterion be fulfilled, then the contractual parties can use Article 23 FTA and take measures to ensure good functioning of the FTA as decided by the joint committee provided for in Article 27 FTA. It would follow that a measure based on the FTA could not be implemented by a unilateral decision of a contractual party.

21. Assuming Switzerland was a Member State or were to use the instruments of the FTA, the standard to be applied in relation to EU countries would be that of "effect on trade." The effect on trade criterion, as applied on trade between EU Member States, can be extensive as it includes any potential or indirect effects, but this does not mean that its assessment can be based on remote or hypothetical effects; potential effects are those that may occur with a sufficient degree of probability.[37] With regards to agreements between EU suppliers and third country distributors imposing export bans, the likelihood of effects is assessed, in particular, with reference to the volume of exports compared to the total market for those products in the EU; therefore, such a proportion should not be insignificant.[38]

22. Nevertheless, the Federal Supreme Court is correct in implying that nothing precludes Switzerland from applying its own Cartel Act to actions that took place outside Switzerland, since Switzerland is entitled to unilaterally decide the scope of its own laws. In other words, a contractual party can apply its own national regulations to extraterritorial conduct when it does not consider it appropriate to appeal to the TFA, or when the "effect on trade" criterion is not fulfilled. By contrast, an EU Member State cannot autonomously define the material scope of its domestic competition laws, since the EU precludes it from prohibiting an agreement that does not restrict competition within the meaning of Article 101(1) TFEU.[39] Theoretically, Switzerland can, thus, go further than an EU Member State with regard to intra-community trade.[40]

23. To conclude on the scope of Article 2 paragraph 2 of the Cartel Act and its extraterritorial reach, nothing precludes Switzerland from unilaterally adopting an extensive concept of what may constitute "effects" in Switzerland. With regard to EU countries, the standard adopted by the Supreme Court goes even further than that applied to trade between Member States; the fact that Switzerland is not a member of the EU allows it to exercise, at least in theory, more freedom of action. Whether it is reasonable to do so, it is a matter of degree; the reasonableness will be tested in future cases.

III. From "effects doctrine" to the object of the agreement: Do substantial provisions qualify effects within Switzerland?

24. Foreign companies enjoy no advantage from the application of the "effect doctrine," but they will, at least, be treated equally regarding the infringement of Article 5 of the Swiss Cartel Act. Therefore, the question arises as to whether Article 5 of the Swiss Cartel Act brings any clarification on occurrence or intensity of the effects.

25. As we saw above, Article 5 of the Swiss Cartel Act declares unlawful "*agreements that significantly restrict competition*."[41] "Significantly" was construed by the Supreme Court in *Elmex* to mean a "low degree,"[42] which also explains that the function of the concept is to distinguish between significant and insignificant cases, aiming particularly to relieve administration. In the EU, the same distinction between significant and insignificant defines the material scope of the prohibition.[43]

26. This lower limit applies to all agreements covered by Article 5 of the Cartel Act, including price fixing and market allocation agreements. At the same time, the Supreme Court leaves open where, how, and by what means (quantitative or qualitative) such a limit is to be set.[44] However, for market allocation agreements, it clearly states that the content of the agreement is sufficient to conclude that it reaches the lower limit and, consequently, restricts significant competition as a rule. This is to be understood as another presumption,[45] and is always rebuttable. Unlike what prevails under EU law

37 Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJEU of 27 April 2004, C 101/81, para. 41 and 43. Regarding the probability, in *Miller* (ECJ, 1 February 1978, case 19/77, pt. 9 to 15), the court assessed the market position of the supplier, in particular its share and sales compared to the total market. In *Parker Pen* (ECJ, 14 July 1994, case T-77/92), the court considered the position and the importance of the parties on the relevant market for the products concerned.

38 Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJEU of 27 April 2004, C 101/81, para. 109.

39 Article 3(2) of Regulation 1/2003.

40 Including members of the EEA.

41 English translation available at the government portal admin.ch.

42 *Elmex*, case 2C_180/2014, pt. 5.1.1.

43 CJEU, 13 December 2012, *Expedia*, case C- 226/11, pt. 16 and 38; ECJ, 9 July 1969, *Völk*, case 5-69, pt. 5–7.

44 *Elmex*, case 2C_180/2014, pt. 5.2.5.

45 Cf. CJEU, 13 December 2012, *Expedia*, case C- 226/11, pt. 37.

and previous case laws of the Federal Supreme Court, to determine whether there is a restriction of competition "by object," the Supreme Court does not refer to the economic context of the agreement, the product, or the relevant market.[46] In *Elmex*, the Federal Supreme Court reads only the relevant contractual provisions to the exclusion of any other fact.

27. Then, the judgment follows on the occurrence of effects and, similarly to EU law, concludes that implementation and actual effects do not have to be established—potential effects are sufficient and can be inferred from the subject matter of the agreement.[47] In *Elmex*, the court sets no requirement of intensity on the effects on competition, not even an abstract qualifier to potential effects, which means that the substantial provisions do not assist foreign companies either in qualifying the intensity of the "effects doctrine" or in assessing to what extent they may be subject to Swiss jurisdiction.

28. By establishing a clear "restriction by object" category for agreements liable to fines, the Swiss Supreme Court achieves closer harmonisation with EU competition law. The EU competition law established very early that absolute territorial protection affecting trade between Member States has, as its object, the restriction of competition.[48] Restoring national divisions by agreements frustrated the most fundamental objections of the Union.[49] Such export bans violate Article 101(1) TFEU, irrespective of actual effects of agreements, of their enforcement,[50] or implementation.[51]

29. However, the Supreme Court follows a different path from that of EU law. The difference lies in how the "object box" is filled in. Whereas in the EU, it is necessary to consider the economic and legal context surrounding the agreement to determine whether an agreement falls into the "object box," in *Elmex*, the Supreme Court looks only into the contractual provisions, showing a blatant disregard for any kind of economic fact. In EU law, careful assessment of the economic and legal context of an agreement is necessary for it to qualify as a restriction by object, thus circumscribing the presumptive basis of the "by object" restrictions, which balances the recent tempering of the *de minimis* doctrine.

30. The other difference is that the ECJ has refused to consider export bans between the EU and territories outside the EU as having the "object" of restricting competition within the EU.[52] Export bans among EU Member States have the object of restricting competition within the EU market; by contrast, a clause banning (re)exports (or better, imports) from non-EU countries cannot be regarded as having the object of infringing on EU competition law, although it may have the effect of doing so. In *Javico*, for instance, the anticompetitive effects could be demonstrated by considering the economic and legal context surrounding the agreement, the structure of the EC market, the market position and sales of the supplier in the EC market, the difference between the prices charged in the EC and those charged outside the EC, and finally, the amount of customs duties and transport costs.[53] In other words, restriction "by object" becomes a restriction "by effect" in an extraterritorial context; to assess the effects, enforcement, and implementation of the export ban, the economic context must also be considered. This is in line with the implementation criterion applied by EU courts to assert territorial jurisdiction.[54]

31. To conclude on this point, the substantial provisions of the Cartel Act do not bring any element allowing foreign companies to assess whether their agreements on exports/imports may fall under the Swiss jurisdiction. The criterion remains the same: possible effects in Switzerland are sufficient. We will see below that the cases brought before courts involved facts that showed sufficient connection with Switzerland, but which were not discussed by the Supreme Court.

IV. Sufficient connection in parallel import prohibition cases

32. Whereas the standard set by the Federal Supreme Court begins to pave a broad extraterritorial reach for the Swiss Cartel Act, the main cases tested before courts show a more tempered situation:

– *Elmex* involved a licensor based in Switzerland and a licensee based in Austria. The Swiss licensor granted the exclusive right to the

46 Cf. ECJ, 14 March 2013, *Allianz Hungária*, case C-32/11, pt. 36; ECJ, 11 September 2014, *Groupement des cartes bancaires*, case C-67/13 P, pt. 53 and 54. Constant EU case law requires, apart from the content of the agreement, that regard must be had to the economic and legal context; the nature of the goods or services affected, the real conditions of the functioning and structure of the market should also be considered. *See* CFI, 9 July 2009, *Peugeot*, case T- 450/05, pt. 44; ECJ, 30 June 1966, *Société Technique Minière*, case 56/65.

47 *Elmex*, case 2C_180/2014, pt. 5.4.2. On the difference between appreciability and effects on competition (including the probability of their occurrence), *see* P. Ibáñez Colomo, Appreciability and *De Minimis* in Article 102 TFEU, *Journal of Competition Law & Practice* 2016/10, p. 651.

48 ECJ, 13 July 1966, *Consten and Grundig*, joint cases 56 and 58/64, p. 342; ECJ, 1 February 1978, *Miller*, case 19/77, pt. 7; ECJ, 8 February 1990, *Tipp-Ex*, case C-279/87.

49 ECJ, 13 July 1966, *Consten and Grundig*, joint cases 56 and 58/64, p. 340.

50 ECJ, 1 February 1978, *Miller*, case 19/77, pt. 7.

51 ECJ, 21 February 1984, *Hasselblad*, case 86/82, pt. 46; CFI, 14 July 1994, *Herlitz*, case T-66/92, pt. 40; *see also* ECJ, 14 July 1994, *Parker Pen*, case T-77/92, pt. 55. However, whereas implementation of agreements entered into between EU companies is not necessary to show effects on competition, implementation has been the main criterion under EU law to assert EU jurisdiction to foreign conduct (ECJ, 20 January 1994, *Ahlström Osakeyhtiö and Others v. Commission*, joint cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, pt. 16).

52 ECJ, 28 April 1998, *Javico*, case C-306/96, pt. 21.

53 ECJ, 28 April 1998, *Javico*, case C-306/96, pt. 22–28.

54 *See* L. Idot, Introduction, Is territoriality still meaningful? *Concurrences* No. 3-2016, p. 29.

Austrian licensee to manufacture and distribute Elmex toothpaste in Austria and excluded direct or indirect exports outside Austria.[55] One of the parties in the agreement was Swiss, consequently, the agreement had sufficient connection with Switzerland.

– In *Nikon*,[56] export ban provisions were found in agreements among EU subsidiaries and independent dealers in the same or other EU Member States as well as in agreements between USA subsidiaries and dealers in the USA.[57] Nikon was present with a subsidiary in Switzerland, and the subsidiary actively took part in the prohibition of passive sales towards Switzerland. The case would be considered as fulfilling the "economic entity doctrine" as a variant of personal jurisdiction.[58]

– In *BMW*,[59] the agreement, including an export ban, was entered into with a supplier based in Germany and its dealers based in Germany,[60] as well. BMW sells BMW vehicles in Switzerland through a concessionaire based in Switzerland; therefore, it sold in Switzerland and directly targeted the territory.

Switzerland was, therefore, directly targeted by suppliers' sales.[61]

33. The majority of concerned provisions related to direct or indirect export bans. The Supreme Court upheld[62] the interpretation of such clauses in the sense that "direct" relates to active sales, and "indirect" to passive sales. Only the prohibition of "passive sales" is covered by the presumption of Article 5 Cartel Act, not the prohibition of active sales.

34. However, the enforcement of the prohibition of parallel imports from distant territories raises several issues. While the "effects doctrine" remains a useful tool to capture all types of conduct demonstrating anticompetitive effects in a country,[63] cases of refusal to sell to unsolicited demands or refusal to supply in an extraterritorial context are particularly sensitive, as competition law is used to force delivery of products from a foreign supplier. In the case of unsolicited demands, the application of the Swiss law would be triggered as soon as a consumer or company based in Switzerland wishes to purchase a product from a dealer outside Switzerland. A simple email, call, or request to dealers based anywhere in the world makes the contemplated transaction a "passive" sale, and agreements entered into between the supplier of the product and that dealer as demonstrating possible effects in Switzerland. The requirement of possible effects in Switzerland as set forth in *Elmex*, with no requirement of even an abstract criterion of intensity, would, therefore, be fulfilled.

35. Obviously, it is the agreement between the foreign supplier and dealer that will be prohibited but always with regard to supplies in Switzerland. In absence of a clause that prohibits exports, the unilateral refusal of the dealer to sell to a request originating from a customer in Switzerland is lawful. However, even within the EU, the distinction between "active" and "passive" sales is not simple, particularly in the modern-day online world; this is all the more valid for dealers in other continents where the distinction between passive and active sales is meaningless.

V. Conclusions for extraterritorial applications in the case of prohibition of parallel imports

36. In *Elmex*, the Supreme Court opted for a broad definition of the territorial scope of the law, by not only refusing, but also prohibiting, to consider any level of intensity and probability of occurrence of effects in Switzerland. Although the substantial provisions regarding the prohibition of parallel imports were used to define the "effects doctrine," they do not bring any additional elements to foreign companies. All price

55 The *Elmex* case presents some similarities with *Javico* (C-306/96). In *Javico*, the goods were produced in the EU and were exported outside; the contract prohibited re-exportation in the EU. In *Elmex*, the toothpaste was produced in Austria by a licensee of a licensor based in Switzerland; the challenged agreement prohibited exports outside Austria by the licensee.

56 Federal Administrative Tribunal (FAT), 16 September 2016, *Nikon*, B-581/2012. The contractual provisions that were challenged are listed on pp. 14–15 of the FAT ruling and include, among others, the obligation on dealers based in Switzerland to purchase exclusively in Switzerland, the prohibition to export outside the EEA area, or the prohibition to sell outside the USA.

57 The provision in the internet dealer contract read: "*In no event shall customer* [dealer] *directly or indirectly, transmit, send, or export any product outside the territory* [USA]". (*see Nikon*, B-581/2012, p. 15)

58 Cf. R. Whish and D. Bailey, *Competition Law*, OUP 2012, p. 495.

59 FAT, 13 November 2015, *BMW*, B-3332/2012.

60 *See* commentaries of D. Mamane and K. Hummel, Extraterritorial Reach of Swiss Competition Law: The BMW Case and Its Consequences for Worldwide Distribution Agreements, *Journal of Competition Law & Practice* 2016/5, p. 326; C. Bovet, Parallel Imports into Switzerland: The Case of Motor Vehicles, *Journal of European Competition Law & Practice* 2013/4, p. 83.

61 We use this expression by reference to the application of the principles in the United States; *see* J. Hazan and D. Ginsburg, Extraterritoriality and intra-territoriality in U.S. Antitrust Law, *Concurrences* No. 3-2016, p. 32.

62 *Elmex*, case 2C_180/2014, 6.4.3.

63 Opinion of Advocate General Wahl delivered on 20 October 2016, case C 413/14 P, *Intel*, para. 294: "*However, were implementation to be considered the only jurisdictional criterion triggering the application of EU competition rules, various types of conduct that may well have the object or effect of preventing, restricting or distorting competition within the internal market would fall beyond the reach of those rules. Here I have in mind conduct that is characterised by an unlawful omission, such as refusal to deal or boycotts. As mentioned in points 288 and 289 above, such an interpretation of Articles 101 and 102 TFEU would be contrary to the wording of those provisions.*"

fixing and market allocation agreements are presumed as unlawful, as a rule, after a simple reading of the contractual provisions and without regard to any other facts surrounding the case or market circumstances.

37. Current enforcement is focused on cases in which the supplier was present in Switzerland through a subsidiary, agent, or distributor. Such circumstances show that the territory is "allocated," and the prohibition of parallel imports aims at isolating it from other territories, presumably to maintain high prices. This would be one way to limit excessive jurisdiction over foreign companies. However, even in such cases, intervention must remain reasonable, in particular for territories from which sales remain marginal.

38. With regard to the European Union, a broad extraterritorial reach of competition law can serve as a means to open markets. This type of unilateral assertion of jurisdiction may reveal a kind of substitute to certain dimensions of conventional cooperation that aim to expand and integrate markets, provided that this form of assertion is always consistent with its legal tradition. The UK, for instance, has always taken a conservative view towards the effects doctrine.[64] It would be, therefore, difficult to use these types of measures to offset potential adverse effects resulting from the withdrawal from the single market.[65]

39. A low standard of the "effects doctrine" may cause more harm to foreign companies than good to Swiss customers. A few sales from distant territories will not improve competition in Switzerland. A form of comity is, therefore, necessary to balance the positive effects for consumers with adverse effects abroad. This is particularly necessary with regard to sales from distant territories and jurisdictions. ■

64 R. Whish and D. Bailey, *Competition Law*, OUP 2012, pp. 501ff.

65 Switzerland adopted the same conservative view regarding antitrust disputes in the seventies.

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