Course: S401006 Business Law for Corporate Decision Makers Prof. Marie-Noëlle ZEN-RUFFINEN GSEM – University of Geneva Date: October 2, 2024	Group Members: 1. Rajendra Laxmi Dhamala 2. Sorina-Ioana Matthey-de-l'Endroit 3. Egide Niyonkuru 4. Ilir Selmani 5. Lidan Wei

Group Assignment: Case Study No. 2

I. Assignment Question:

Subject of the case: The case submitted to you is an investigation concerning restraints of competition within the meaning of art. 27 CartA. You are the Competition Commission in charge of making a decision after the investigation (art. 30 CartA). You must determine whether the restraint of competition brought to your knowledge is unlawful or not.

II. Case Study Analysis:

In the following analysis it is demonstrated that the restraint of competition brought to our knowledge is unlawful. In order to demonstrate this, we analyze the case study based on: (1) scope of the LCart, (2) unlawful practices by dominant undertakings, and (3) a conclusion showcasing our results and explaining the decision of the Competition Commission.

The companies/undertakings involved in this case study are as follows:

Undertaking A = a company that is based in Switzerland, which produces diamond rotary instruments for dental care.

Undertaking B = a mail-order company which is also geographically located in Switzerland, whose specialty is to sell dental supplies to practitioners.

1. Scope of the LCart (Defining Concepts & Terminology)

a). LCart is an abbreviation for the Swiss Federal Act on Cartels and Other Restraints of Competition. This law governs the business competition in the Swiss market which means any activity having an economic impact in the Swiss economic market is monitored, sanctioned or awarded based on it.

b). The ComCo (The Swiss Competition Commission) is the Commission in charge of ensuring the LCart is enforced, respected, and followed in the Swiss market to promote innovation and fair business practices.

c). The LCart's role is to analyze whether the agreement among undertakings in the Swiss territory doesn't result in anti-competitiveness or abuse of dominant position.

d). For this case, we will determine whether the restraint of competition brought to our knowledge involves an abuse of dominant position as outlined in Art. 7 CartA.

2. Unlawful Practices by Dominant Undertakings

2.1. Analysis of Dominant Position:

a). Defining the Relevant Market:

(i) Defining the Product Market: The product market analyzed in this case study is defined as being composed of **diamond rotary instruments,** which are used within the dental care profession.

(ii) Defining the Geographic Market: The geographic market defined in the case study is described as being **Switzerland**. This is due to the fact that undertaking A and all the other competitors are described to sell and distribute diamond rotary instruments only within this country, and nowhere else abroad. As such, our finding proposes that because this case addresses the Swiss market, CartA should be enforced to assess the level of abuse of dominant power that A places on the aforementioned market.

b) Position on the Market:

The undertaking A has the Dominant Position of diamond rotary instruments in the Swiss market due to following reasons:

a). 70% of dentists purchase exclusively products of A. Moreover, these instruments are the only instruments used for peripheral coronary preparation of tooth and work of the dental enamel. All the other competitors combined have only 30% market share.

b). The university clinics that train future dentists use A's products during their learning process. They will be more inclined to use Company A's products in their future careers as they are already acquainted with using products of Company A during the learning phase.

c). Although A's prices are much higher than those of its competitors, they continue to hold a large percentage of the market because consumers keep purchasing from them regardless of their higher prices. Therefore, A's considerably larger market share is maintained, indicating that their dominance allows them to continue creating a large price disparity between the prices they have as compared to the other suppliers/producers.

d). There is a limited or no price sensitivity as no matter the high difference in the price of the product from the competitors, the customers are still choosing the product of company A.

Clarification: The Company A holds the Dominant position with its 70% of market share in diamond rotary instruments where they can clearly control the market price as the product is still in demand despite its price being higher than its competitors.

2.2. Unlawful Practices:

a) Are there any restrictive or exploitative practice(s) leading to abuse?

Restrictive Practice:

The restrictive behavior of Company A, mainly violated the relevant provisions of Article 5 of CartA, which is analyzed as follows: A refused to supply B on the grounds that B was a mail-order seller, which clearly violated Art 5 (1), because this provision prohibits any behavior that clearly restricts competition. A used this improper reason to set up corresponding market restrictions or market barriers for B to participate in market competition. This special form of restrictive competition method prevented B from competing on an equal footing with the other peers. A also further violated Art 5 (3).

Exploitative Practice: Price Exploitation

1. Company A's product prices are much higher than those of the competitors (for example: for categories 3 and 4 of the products, Company A's price is CHF 10.20, while the competitors' price is CHF 4.50.)

2. This price difference not only restricts B from participating in market competition on an equal footing, but also forces consumers（Dentists/Practioners） of dental products to pay higher prices to accept their previous "habit," thus using Company A's products has become a necessity for their work. This is also a price exploitation behavior brought to consumers by A through unfair competition.

b) Are there Grounds for Abuse?

According to: Art. 7, unlawful practices by dominant undertakings and undertakings with relative market power.

Abuses of the Dominant Position:

As it has been established, A has a dominant position, and according to the Art. 7 (2 a, b and c), A has abused its position on the market by the following actions:

a. **Refusal to deal (e.g., refusal to supply or to purchase goods)**: Company A refused to deal with company B and supply them the diamond rotary instruments.
b. **Discrimination between trading partners in relation to prices or other conditions of trade:** There is discrimination between trading partners, because A refuses to deliver to B, under the pretext that B is a mail-order seller. This discrimination affected B and placed B at a competitive disadvantage.
c. **Imposition of unfair prices or other unfair conditions of trade**: A delivers its products only to dental providers who are registered with the commercial register, because they are able to prove their creditworthiness and have specialized dealers who can provide direct information about their products (i.e., advice and customer service). A refuses to deliver to B, mainly claiming that by selling dental supplies by mail order, B is not able to advise practitioners about the rotary instruments.

III. Conclusion of Analysis:

<u>The undertaking A, showcases holding a relative market power</u> because, as described in the assignment (and in accordance to Art. 4 IIbis CartA): (1) the majority of the other undertakings/sellers depend on A to be able to supply their buyers with the goods produced by A, and (2) while there are similar/interchangeable products that the other sellers, including B, can purchase on the Swiss market, they are not as in demand as the ones produced by A.

Furthermore, it is argued that the products created by A are interchangeable with other instruments from competing manufacturers. Still, because A is dominant on the market (i.e., it produces 70%, more than half, of the products being analyzed in this case study) and because A refuses to sell to B, this leads B (and all of the other suppliers/sellers of this good) to depend on A, in order be and continue to remain competitive on the market.

Therefore, with B being dependent on A (as well as the other distributors being dependent on A), and A refusing to sell to B (therefore hindering B's operations on the market), we are able to observe that A has a greater relative market power and a large influence over the other distributors in Switzerland. This leads to A restricting the overall competition for the goods being discussed within Switzerland.

3.1. Irrational Justification by Company A:

a. A's products are interchangeable with the instruments of competing manufacturers but even if they are interchangeable, the customers still opt for the product of Company A, irrespective of their higher prices.
b. B suffers additional losses by losing customers who prefer to obtain all the necessary dental supplies for their offices from a single supplier. Hence, by not supplying the diamond rotary instruments to company B, company A is not only hampering the sale of that particular product but is also hampering the sale of other associated dental products.
c. The university clinics use A's products therefore, dentists are already used to these products and there is no requirement to advise these practitioners on the rotary instruments as they are already familiar with them. The buyers who have questions about the product, are most likely to purchase from a store and not do a mail order.

Further Clarifications: Company A has abused its Dominant Position in the market by refusing to deal, thus discriminating between the trading partners and imposing unfair conditions of trade on undertaking B. Despite having a high difference of price margin in all four categories of the rotary instruments, company A is able to maintain its dominant position on the market. However, its arguments stating that "B is not able to advise practitioners on the rotary instruments" is not justifiable, as the dentists are already equipped with the needed information on the functionality of the product from their time in university clinics.

3.2. Results and Decision of the Competition Commission:

Following our analysis, we propose the following decisions:

Taking into account article 7 of CartA, we can come to the conclusion that by refusing to supply B without any valid reason, A has indeed abused its dominant position. Thus, A's refusal to sell to B, in this case, is illegal since it infringes competition and, above all, harms consumers.

As a result, A will be obliged to enter into an agreement with B for the supply of products, and will therefore have to renounce its initial refusal. This agreement will ensure that B receives A's products under fair conditions. Thanks to this agreement, B will be able to compete fairly and effectively, and above all to offer customers more options.

The Competition Commission will ensure that A respects the conditions and complies with the agreements defined above. It will also check that A is not implementing any other restrictive practices that could have an impact on competition in the market.

With regard to potential sanctions, if A fails to comply with the decisions defined, the Competition Commission may impose sanctions under CartA. These potential sanctions could include fines or other measures designed to restore competitive conditions in the market.

In conclusion, the aim of these decisions is to properly restore competition to the Swiss dental instrument market, by ensuring that all practitioners in this industry can choose between several suppliers, and above all that they can make purchasing decisions with full information.

Key References:

Fedlex. (1995, October 6). Federal Act on Cartels and other Restraints of Competition. https://www.fedlex.admin.ch/eli/cc/1996/546_546_546/en

Class notes, lectures, and presentations.