

DRAFT FOR REVISED COMMUNICATION ON VERTICAL AGREEMENTS IN SWITZERLAND

INTRODUCTION

On 30th April 2010, the COMCO issued a draft for a revision of the existing Communication on vertical agreements. The deadline for submitting public opinions was 8th June 2010.

The reform of the Cartel Act in 2003 strengthened Swiss competition law. The legislator sought to address the existing weaknesses and to align Swiss competition law closer to the EU framework, not only by introducing direct sanctions for serious infringements or by enacting new investigation procedures such as dawn raids, but also by introducing a presumption of illegality for specific vertical agreements involving resale price maintenance and absolute territorial protection in art. 5 para. 4 Cartel Act.

Recognising the issues raised by restrictive agreements and on the basis of Art. 6 Cartel Act, the Swiss Competition Commission ("COMCO") published a Communication on vertical agreements that came into force on 2nd July 2007. In this notice, the COMCO incorporated its latest legal practice and sought parity with European competition law.

The following overview gives details on the suggested modifications, on the similarities and differences between the Swiss Communication and European competition law.

MOTIVES FOR THE REVISION

The main reason for revising the existing Communication on vertical agreements was to prevent Switzerland from being legally isolated by trying to adopt clauses close to European competition law.

The COMCO recognizes moreover that, in 2007, it was not possible to assess the practical applicability of the Communication on vertical agreements. On the basis of the experience gained due to leading cases, such as "Felco/Landi", "Gaba/Elmex" and "Hors-Liste", the COMCO has extensively dealt with the subject of vertical restraints and stated more precisely its legal practice. The revision of the Communication on vertical agreements incorporates the latest developments of the case law pertaining to verticals restraints, recommended retail prices and territorial restrictions.

MOST IMPORTANT REVISED CLAUSES

The revised clauses concern especially the following issues:

- Advertisement or sales promotion measures in media or on the internet are to be considered as passive sales as stipulated by European competition law.
- Permission of undertakings to rebut the assumption of elimination of effective competition by considering the entire market situation for intrabrand and interbrand competition: The determining factor is the existence of sufficient inter- or intrabrand competition in the relevant market or the combination of intra- and interbrand competition leading to sufficient effective competition. This clarification is primarily an adjustment due to the COMCO's latest legal practice, where intra- and interbrand competition was analyzed.
- For assessing the competitive significance of an agreement, both quantitative as well as qualitative criteria have to be considered. Each of these criteria must be considered on a case-by-case basis for an entire assessment. A qualitative serious impairment may lead to a considerable restriction on the competition even if there are negligible quantitative effects and vice versa.
- Agreements between undertakings whose market share does not exceed 30% are deemed to be justified on grounds of economic efficiency. In alignment with the European competition law the draft aims to consider the grown buyer power of big retailers.
- Finally the issue of recommended resale prices is meant to be settled as in the European rules. They may have efficiency increasing effects by enhancing the market transparency for the consumers and may be risky since they can lead to resale price maintenance, especially if they are linked to exercise of pressure or to granting of specific incentives.

CRITICISM

This revised Communication on vertical restraints brings a pronounced tightening of Swiss competition law and represents a further move towards European competition law. However, the revised clauses still contain some Swiss specifics which should be eliminated. This is particularly true for the preamble of the Communication which retains criteria of the existing Communication and is therefore partially in contradiction to the revised clauses. Such a discrepancy may lead to legal uncertainty. Also the phrasing and the terms used in the preamble are vague. Besides that, the clause related to online-business is not detailed enough, so that it may bring along uncertainty.

SUMMARY

The revision of the Communication on vertical agreements has many positive aspects. An analysis of its content shows that Swiss competition law has achieved a clear move towards convergence with European competition rules, even if some differences remain. This alignment with the European framework brings positive effects with regard to the legal certainty for all involved parties. However, there are still some clauses which contain specific criteria that do not correspond to European standards. These clauses should be abolished in order not to jeopardize the goal of enhancing legal certainty and facilitating business exchange with Europe.

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