New Vertical Restraints Notice of the Swiss Competition Commission

Approximation to the EU regime – Increased, but not complete legal certainty for undertakings

On August 1, 2010, a new Vertical Restraints Notice dated June 28, 2010 of the Swiss Competition Commission will enter into force and replace the previous Vertical Restraints Notice dated July 2, 2007. The new Vertical Restraints Notice entails an approximation to European competition law in various points. However, an actual harmonization is still not achieved.

This Bulletin summarizes the most important changes that the revised Vertical Restraints Notice[1] of the Swiss Competition Commission (**ComCo**) brings about in comparison to the previous Vertical Restraints Notice and sets out differences to the European Block Exemption Regulation for Vertical Restraints[2] (**VBER**).

Main goals of the new Vertical Restraints Notice

With the publication of the new Vertical Restraints Notice, two main goals are pursued:

On the one hand, the most recent case law of the Competition Commission shall be taken into account (Preamble, consideration VII). However, two of the three cases in the area of vertical restraints have been appealed by the parties. The as yet outstanding examination of these decisions by the courts, for which the Vertical Restraints Notice is not binding, could hence lead to a different legal assessment.

On the other hand, the new Vertical Restraints Notice shall also take into account amendments in European competition law and thereby safeguard that as far as possible the same rules apply as in the European Un-

[1] Notice on the competition law treatment of vertical agreements. The text of the new Vertical Restraints Notice is published – so far in the official languages German, French and Italian only – on the ComCo's website, http://www.weko.admin.ch/dokumentation/01007/index.html?lang=de.

[2] Commission Regulation (EU) No 330|2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

ion (Preamble, consideration VII). However, a true harmonization with EU competition law is opposed by the fact that Swiss competition law is conceptually different: It is based on the constitutional requirement of a mere abuse regulation, and also the legislative method, with the statutory presumption that certain (horizontal and vertical) agreements lead to the elimination of effective competition, is genuinely Swiss. The Vertical Restraints Notice in its previous and its new form is therefore ultimately the attempt to adapt the Swiss rules to the EU mechanics.

The most important changes of the new Vertical Restraints Notice

The probably most important change relates to the introduction of an additional *market share threshold*, as it was also newly introduced in art. 3 para. 1 of the VBER (section 16 para. 2 Vertical Restraints Notice). Up to now, agreements that do not contain specific clauses (in analogy to a "black list") and that do not influence the market cumulatively with other agreements and thereby significantly restrict competition were "as a rule" deemed to be justified without the need for an individual assessment if the *supplier's* share of the relevant market in which it sells the contract goods or services does not exceed 30%. As of now, this will only be the case if cumulatively the supplier's share of the relevant market in which it sells the contract goods or services *and also* the *buyer's* share of the relevant market on which it purchases the contract goods or services do not exceed 30%.

Important adaptations and an approximation to the legal situation in the EU are made in the new Vertical Restraints Notice for the assessment of *price recommendations*. The previous Vertical Restraints Notice provided for five criteria that were of importance for the assessment of price recommendations, but the relevance of and the relationship between these criteria were not completely clear. The new Vertical Restraints Notice now clarifies that price recommendations are considered as qualitatively serious (only) if they "amount to a fixed or minimum sale price as a result of pressure from, or the incentives offered by, any of the parties" (section 15 para. 2 Vertical Restraints Notice; see also section 12 para. 2 lit. a Vertical Restraints Notice; free translation from the German version). This conforms with the regulation as it is foreseen in art. 4 lit. a of the VBER. The previous four further criteria (communication of the price recommendations not openly; lack of statement that the price recommendations are non-binding; considerably higher price level for the concerned products than in neighboring countries; actual adherence to the price recommendations by a large number of resellers and distributors) are still contained in the new Vertical Restraints Notice. However, it is now made clear that these criteria can merely give rise to "pick up" price recommendations – accordingly, they are mere "threshold criteria", but not "intervention criteria". The only intervention criterion is whether the price recommendations amount to a fixed or minimum sale price due to pressure or incentives.

A further approximation to the legal situation in the EU results with respect to the importance of *inter-brand competition*. Pursuant to the previous Vertical Restraints Notice, the statutory presumption that certain agreements eliminate competition (for vertical agreements, these are agreements regarding fixed or minimum prices and absolute territorial protection) could not be rebutted simply by showing inter-brand competition, but only by showing the existence (also) of intra-brand competition. This was not in line with European case law and deprived market participants of the most important tool for proving effective competition. In the new Vertical Restraints Notice, it is now set out that, for the rebuttal of the presumption of an elimination of competition, "an overall assessment of the market has to be made, taking into consideration intra-brand and inter-brand competition" (section 11 1st sentence Vertical Restraints Notice; free translation from the German version). In doing so, it is decisive whether sufficient intra-brand or alternatively inter-brand competition exists on the relevant market or whether the combination of the two leads to sufficiently effective competition (section 11 2nd sentence Vertical Restraints Notice).

Appraisal of the new Vertical Restraints Notice

The declared goal of ComCo to aim for EU compatibility in the competition law assessment of vertical restraints is to be appreciated unreservedly. The new Vertical Restraints Notice makes an important step towards this goal by bringing about an approximation in the two central points where there used to be differences (assessment of price recommendations and taking into account of inter-brand competition).

However, there still remain differences. For example, ComCo has amended the definition of *passive sales* (section 3 Vertical Restraints Notice), the prohibition of which is presumed to eliminate competition and can be sanctioned by fines. This amendment is not congruent with the detailed regulation in the guidelines to the VBER and, by using nondescript terms such as "sound alternative", does not contribute to legal certainty.

It remains as a significant difference to the regulation in the EU also under the new Vertical Restraints Notice that its provisions cannot serve as an actual *"safe harbor"* to market participants. Rather, it is pointed out in several provisions, in particular with regard to market share thresholds, that the assessment only applies "as a general rule", which leaves discretion to ComCo to deviate from the rule in a particular case. Accordingly, the legal certainty that is aimed for cannot be achieved.

Next steps for companies operating in Switzerland

The new Vertical Restraints Notice enters into force on August 1, 2010, replacing the previous Vertical Restraints Notice of July 2, 2007 in its entirety. During a transitional period of one year, it shall not apply to agreements that have entered into effect prior to August 1, 2010 and are in conformity with the criteria of the previous, but not of the new Vertical Restraints Notice.

Until July 31, 2011, companies active in Switzerland therefore have to assess (and to adapt, if required) agreements and distribution systems that have already been concluded today with respect to their conformity to the criteria of the new Vertical Restraints Notice. Agreements that are newly concluded as from August 1, 2010 have to be in line with the criteria of the new Vertical Restraints Notice from the outset. When in doubt, advice from the internal legal department or external legal counsel should be sought to avoid the risk of fines and|or the risk of agreements becoming unenforceable.

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