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In a nutshell

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COMCO's adaptations to the Communication on Vertical Restraints to bring it into line with the Gaba judgment

The Competition Commission (COMCO) has made adjustments to the communication on the treatment of vertical agreements under competition law. Agreements are defined as vertical (rather than horizontal) if they are concluded between companies not active at the same level of production and/or distribution (for example distribution agreements between manufacturers and wholesalers).

The trigger for adapting the communication was the publication at the end of April 2017 of the Federal Supreme Court's Gaba (Elmex) judgment of 28 June 2016 (2C_180/2014). In addition to that, COMCO has for the first time adopted explanatory notes to assist with interpretation and following a similar pattern to the European Union's Guidelines on Vertical Restraints. The adaptations to the communication affect individual points only, and their primary purpose is to bring the communication in line with the interventionistic Gaba decision. However, the explanatory notes, which summarize the practice of recent years, are likely to be of considerable significance in the future.

Per se significance

In the surprisingly strict landmark judgment in the Gaba (Elmex) case, the Federal Supreme Court had decided that both hard-core horizontal agreements within the meaning of Art. 5 para. 3 Cartel Act (price, quantity and territorial agreements) and hard-core vertical agreements within the meaning of Art. 5 para. 4 Cartel Act (resale price maintenance and absolute territorial protection) fundamentally satisfy the criterion of significance within the meaning of Art. 5 para. 1 Cartel Act ("per se significance") if the assumption of elimination of effective competition can be disproved.

That applies regardless of quantitative criteria, such as market shares of the companies involved in the agreement. It is enough for such agreements to have the potential to affect competition; it is not necessary for there to be evidence of real effects or to show that the agreement has been effectively put into practice. A company involved in such an agreement can then only escape a sanction if it manages to justify its behaviour on grounds of economic efficiency. With this new jurisprudence, it is likely that various cases that were not pursued or were abandoned in the past on account of lack of significance (small market shares, etc.) will now be qualified as inadmissible and fines will be imposed.

This tightening-up does not, however, apply for all types of agreement. The communication on vertical restraints makes it clear, for instance, that with all other vertical anti-competitive agreements it is not just the qualitative criteria that are to be considered but the quantitative ones as well, and thus that there is not an automatic assumption of per se significance. Therefore, in non-hard-core cases, the authority has to prove significant effects on the relevant market.

Vertical price agreements within the meaning of Art. 5 para. 4 Cartel Act

The most important characteristics of vertical price agreements are summed up in the explanatory notes on vertical restraints of competition. For there to be a vertical price agreement there must be coordination between suppliers and their distributors as regards the setting of minimum or fixed prices. Apart from written agreements, it is also possible for that to happen through coordinated behaviour, such as price recommendations if there is a minimum consensus of will between the issuer and the recipient as regards pursuit of the recommended prices. Price agreements can also be concluded indirectly, e.g. through discounts or reimbursements of advertising expenditure to be made dependent on adhering to a particular price level. One question that is particularly controversial in practice is when does a price recommendation become a sanctionable vertical price agreement within the meaning of Art. 5 para. 4 Cartel Act. It is to be expected that there will be a judgment from the Federal Administrative Tribunal within a matter of months that will clarify that issue in a case regarding price recommendations for erectile-dysfunction drugs.

Vertical agreements on absolute territorial protection within the meaning of Art. 5 para. 4 Cartel Act

Required is a distribution contract, an allocation of territory and a prohibition on sales across territorial boundaries. The explanatory notes on vertical restraints echo the Federal Supreme Court's reasoning, according to which the term "distribution agreement" is to be understood broadly. In addition to distribution contracts as such, an absolute territorial protection may also be provided for in individual clauses of contracts dealing with the procurement, sale or resale of products that are contained in other agreements, such as franchise, licence or technology transfer contracts.

Article 5 para. 4 Cartel Act only covers market protection through absolute territorial protection. Absolute territorial protection exists if there is a direct or indirect prohibition on passive sales into an allocated territory by distribution partners from outside that territory. A passive sale is to be understood to mean, amongst other things, fulfilment of unsolicited orders from individual customers outside of the own contractual territory. As examples of agreements on absolute territorial protection, the explanatory notes on vertical restraints mention agreements between manufacturers and their distribution partners, according to which the territory of the EEA or a territory within the EEA is allocated to distribution partners and those distributors are forbidden to make (passive) sales to customers outside of the EEA or a territory within the EEA. It is to be expected that such EEA clauses will represent relatively frequent occurrences.

Examples that are not deemed to be a vertical price or territorial agreement within the meaning of Art. 5 para. 4 Cartel Act

The explanatory notes on vertical restraints contain several examples that are not deemed to be vertical agreements on prices or absolute territorial protection within the meaning of Art. 5 Para. 4 Cartel Act:

- Prohibitions on passive selling to the

disadvantage of the supplier, such as the duty on foreign manufacturers vis-à-vis the Swiss general importer to refer any unsolicited orders from traders or final customers within Switzerland to the Swiss general importer;
- Matters within groups of companies (intra-group agreements);
- Pure international price differences without a bearing on vertical price agreements or agreements on absolute territorial protection; and
- Restrictions on passive sales to certain groups of customers.

Online commerce

The explanatory notes on vertical restraints include a summary of the rules governing online commerce. Prohibitions and/or restrictions on internet sales constitute prohibitions on passive sales to the customer group of internet customers and thus do not fall within the scope of Art. 5 para. 4 Cartel Act as long as no other qualifying circumstances exist from which it might be concluded that there is a vertical price agreement or an agreement on absolute territorial protection.

The explanatory notes on vertical restraints mention the following examples as qualifying circumstances for a vertical price agreement:
- Direct and indirect influence of the supplier on the customer's prices, for example by influencing the discount policy;
- Measures by the supplier, such as threats, intimidations, warnings, sanctions, delays or suspension of deliveries and notice of termination of a contract in the event of the customers not maintaining a particular price level.

According to the explanatory notes on vertical restraints of competition, the following are to be considered as examples of qualifying circumstances for a vertical agreement on absolute territorial protection:

- Agreements that envisage that the trader is to prevent customers from Switzerland from looking at their website or that they are to set up an automatic redirection from their website to the manufacturer's website or the website of other traders in Switzerland;
- Agreements that envisage that the trader is to break off the internet transactions of final customers as soon as their credit card makes it possible to recognise an address not within the trader's contractual territory.

Unsolved problems

Several open questions remain unanswered in the explanatory notes on vertical restraints. The Federal Supreme Court has ruled that agreements within the meaning of Art. 5 para. 4 Cartel Act are no more than "in principle" relevant or relevant "as a general rule". Now, if something only applies in principle or as a general rule, there must also be exceptions to it. No answer has been provided to the question as to whether in the case of so-called "hardcore agreements" Swiss law would allow for the existence of a safe harbour in the sense of a de minimis rule.

The EU's Guidelines on Vertical Restraints contain numerous references to franchise systems, whereas the explanatory notes on vertical restraints on competition do not mention the matter at all. The explanatory notes do, however, state that the EU's Guidelines on Vertical Restraints apply in an analogous way for Switzerland too (giving consideration to the legal and economic conditions prevalent in Switzerland). It is a general direction that is to be welcomed, even if uncertainty persists on account of the fact that, in the above-mentioned Gaba judgment, the Federal Supreme Court has regrettably held that the rules contained in the EU Technology Transfer Block Exemption Regulation are not relevant for treatment of such agreements under Swiss competition law. So, as far as Swiss law is concerned, doubt still persists as to the extent to which it is advisable for companies to allow themselves to be guided by EU practice.

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