

# Update

Newsflash September 2015

## Revised Notice on the Assessment of Vertical Agreements in the Motor Vehicle Sector

**The Swiss Competition Commission adopted a revised Notice on the Assessment of Vertical Agreements in the Motor Vehicle Sector, which will enter into force on 1 January 2016. It differs in several respects from the corresponding EU regulation, continuing a specific Swiss approach for regulating the motor vehicle sector.**

### Introduction

On 15 July 2015, the Swiss Competition Commission (“ComCo”) published the revised Notice regarding the Competition Law Assessment of Vertical Agreements in the Motor Vehicle Sector (the “Notice”) together with revised explanations (the “Explanatory Notice”).

The Notice will replace the existing notice of 2002 and enter into force on 1 January 2016. There is a transitional period of one year during which existing contracts have to be adapted to the revised Notice.

### Divergence with EU law

The Notice maintains sector-specific rules for both primary (sales of new motor vehicles) and secondary markets (repair and maintenance services; sales of spare parts). This contrasts with the approach taken in the last revision of EU law applicable to motor vehicle distribution, whereby primary markets are no longer subject to sector-specific regulation (and thus fall under the general provisions governing vertical agreements) while secondary markets remain regulated by specific rules. This “Swiss Finish” will need to be taken into account in particular in relation to pan-European networks falling under both, EU and Swiss rules.

### Structural Revision

The revised Notice does not provide for fundamental changes as compared to the existing rules. However, the Notice has been significantly restructured in order to be better aligned with the existing Notice on the Competition Law Assessment of Vertical Agreements of June 2010 (the “Vertical-Notice”).

The Notice introduces in particular a catalogue of “serious restrictions” on the quality of competition. This catalogue encompasses territorial restrictions regarding the distribution of motor vehicles as well as the provision of guarantee, practices which prevent the separation of sales and service, restrictions on the distribution of spare parts, the limitation of access to technical documentation, restrictions on the right of dealers to sell products of different brands (multi-branding) and the termination of contracts without observing specific notice periods.

According to the notice, the restrictions in the catalogue remain subject to assessment as to whether such restrictions significantly affect effective competition and, if such is the case, if they are not justified based on grounds of economic efficiencies.

### Obligation to Contract?

The Notice fails to provide clear guidance about whether there is an obligation to contract granting dealers and repairers access to distributions systems in the primary and secondary markets. Only the Explanatory Notice continues to assume that repairers meeting qualitative selective criteria would in principle be entitled to join a network as authorized members. In 2014, the Commercial Court of Zurich did not embrace these considerations already set out in the preceding explanatory notice of 2002 and rejected a request for interim relief, denying an obligation for a car importer to continue a service agreement (see our newsflash of March 2015, "Termination of a service contract - no obligation to contract").

### Relevant Product Market

ComCo introduced in the Explanatory Notice a short section about the definition of relevant product markets in relation to the sale of new motor vehicles. This section is in line with the definition carried out in the BMW decision handed down approximately three years ago by ComCo, confirming relatively narrow relevant markets (very compact cars, compact cars, lower standard size cars, upper standard size cars, upper class cars, luxury cars and utility vehicles). The validity of this delineation remains to be seen, as the BMW case is still on appeal before the Federal Administrative

Court. The Commercial Court of Zurich in its recent interim relief judgement (see above) left these delineations open and considered a system market spanning across primary and secondary markets; an aspect which ComCo ignored in the Notice and Explanatory Notice.

### Outlook: Potentially conflicting regulations and uncertainty about the relevance of the Notice for civil litigation

The revised Notice (and its Explanatory Notice) will interact with the Vertical-Notice which will apply to the extent the Notice does not contain relevant provisions. Issues could indeed arise from this simultaneous applicability, but also from collisions with EU rules which distinguish between primary and secondary markets.

Further, it remains to be seen whether and how the Notice will influence a civil court's reasoning on civil claims that are based on competition law infringements. Two civil judgments for interim relief in 2010 and 2014 show that judges seem to qualify the Notice as a mere interpretative aid and do not consider themselves bound to it.

**Please do not hesitate to contact us if you have any question.**

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