

Update

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Revised Verticals Notice issued subsequent to the GABA decision

On 26 June 2017, the Competition Commission (ComCo) issued the revised Notice on the Competition Law Treatment of Vertical Agreements and corresponding explanatory notes.

The revised Verticals Notice implements the GABA decision

Following the GABA decision of the Supreme Court dated 28 June 2016 (BGer 2C_180/2014; Newsflash April 2017) ComCo has revised and modified the Notice on the Competition Law Treatment of Vertical Agreements of 28 June 2010 (“**Notice**”). The Notice is supplemented with explanatory notes that assist with interpretation.

The Notice remains universally applicable subject to sector-specific rules, such as those regarding motor vehicle trade. The relevant agreements between the seller (e.g. manufacturer, importer, supplier, distributor, wholesaler, etc.) and buyer/dealer (or also franchisee, licensee etc.) may occur on any level of the value chain concerning use, sale or resale of goods or services by the buyer. Agreements with the principal subject-matter being the transfer or the use of intellectual property rights are not addressed.

In the following, we will summarize the key findings.

Agreements according to Article 5 (4) CartA are, in principal, significant

Article 5 (4) CartA relates to vertical agreements on minimum or fixed resale prices and on absolute territorial protection.

Section 12 (1) Notice states that agreements under Article 5 (4) CartA that do not eliminate competition are, in principle, significant according to Article 5 (1) CartA. The term “in principle” implies that bagatelle cases are exempted. Neither the Notice nor the explanatory notes define a minor case.

The Notice does, however, clarify that a vertical agreement on absolute territorial protection cumulatively requires the following: a distribution agreement, the allocation of a territory and an inter-territorial sales ban. The term “distribution agreement” shall be given an extensive interpretation. It not only covers actual distribution agreements but also individual clauses regarding the procurement, sale or resale of products in other types of contracts (e.g. in franchise, license or technology transfer agreements). Territories can be allocated directly or indirectly, e.g. by regions, countries or supranational territories (e.g. EU or EEA). A sales ban is defined as the prohibition of

both active and passive sales by other distributors into allocated territories.

Circumstances that do not fall under Article 5 (4) CartA

According to the established practice of the competition authorities which is now set out in the Notice, the following five circumstances do *not* fall within the scope of Article 5 (4) CartA: (i) bans on passive sales imposed on the supplier, (ii) group-internal vertical agreements as long as they do not include market foreclosing practices of dealers not belonging to the group, (iii) international price differences without corresponding agreements, (iv) limitations on passive sales to specific customer groups and (v) the prohibition of active sales into territories allocated to other dealers (relative territorial protection).

Clarifications on active and passive sales

The Notice newly contains revised descriptions of active and passive sales. According to the Notice specifically addressing a customer constitutes an *active sale* while fulfilling an unsolicited order of a customer is a *passive sale*. General advertisement or sale promotions that reach customers in territories or customer groups (exclusively) allocated to another different dealer are also regarded as passive sales as long as they represent a “reasonable alternative” to directly contacting customers outside of these territories or customer groups, e.g. in the own territory. As before, the Notice qualifies the prohibition of only active sales (relative territory protection) as a qualitatively significant restriction as long as none of the exceptions in the Notice apply. However, imposing sanctions is, in general, not possible in such cases.

Online sales as a form of passive sale

Under certain circumstances, bans or restrictions on online sales are considered to be (hardcore) agreements on prices or territories in the meaning of Article 5 (4) CartA. This is the case when the supplier influences the prices of the dealers directly or indirectly, e.g. through threats, warnings or delays in delivery. Also agreements regarding the following constellations can be problematic: agreements providing that (i) dealers prevent Swiss customers from being able to visit their website, (ii) dealers redirect customers automatically to the website of the supplier or a different dealer in Switzerland and (iii) online transactions from other territories are prevented as soon as the credit card allows the identification of an address outside of the (contractually) allocated territory. In addition, an obligation in a selective distribution system that prevents authorised dealers from using the internet to reach more or new customers by imposing requirements upon the dealers regarding online sales that, overall, are not equal to the requirements regarding physical sales may constitute a qualitatively serious agreement, but it is not subject to fines. By contrast, qualitative criteria regarding the use of the internet for the resale of products to guarantee that the dealer’s online-business equivalent with the sales model of the supplier are permitted. In general, it must be noted that the significance of bans and restrictions on internet sales as well as their justification based on economic efficiencies remain subject to a case-by-case assessment.

Please do not hesitate to contact us in case of any questions.

Legal Note: The Information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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